CASES DECIDED

IN

THE UNITED STATES COURT OF CLAIMS

AUGUST 1, 1976 TO OCTOBER 31, 1976

WITH

REPORT OF DECISIONS OF THE SUPREME COURT IN COURT OF CLAIMS CASES

REPORTED BY

AUDREY BERNHARDT

REPORTER

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CONTENTS

1. JUDGES AND OFFICERS OF THE COURT
2. ASSISTANT ATTORNEYS GENERAL CHARGED WITH THE DEFENSE OF THE GOVERNMENT
3. TABLE OF CASES REPORTED
4. TABLE OF STATUTES CITED AND RULES OF THE COURT CITED
5. DESIGNATION OF A JUDGE FOR SERVICE ON ANOTHER COURT
6. LEGISLATION RELATING TO THE COURT OF CLAIMS
7. COURT HISTORY—PART I; THE JUDGES 1855–1976
8. OPINIONS OF THE COURT
9. ORDERS
10. JUDGMENT ORDERS
11. REPORT OF SUPREME COURT DECISIONS
12. TOPICAL INDEX

JUDGES AND OFFICERS OF THE COURT

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WILSON COWEN

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ROBERT L. KUNZIG
MARION T. BENNETT

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DON N. LARAMORE

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ROALD A. HOGENSON

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* Retired, effective January 1, 1971, and recalled as a senior trial judge.

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(Charged with the defense of the Government)

AUGUST 1, 1976—OCTOBER 31, 1976

PETER R. TAFT
Land and Natural Resources Division

SCOTT P. CRAMPTON
Tax Division

REX E. LEE
Civil Division

TABLE OF CASES REPORTED

	Page
ABELL, LEROY W., ET AL	387
AGWAY, INC	384
ALEXANDER, ROGER	368
ALLISON, MELVIN, ET AL	332
ALPHATYPE CORP	345
AMPEX CORP	366
ANTONELLI, D.F., JR. (SEE WASHINGTON MED. CENTER).	
APPLEGATE, REX L., ET AL	380
AREY, DOUGLAS SCOTT	343
BALTIMORE CONTRACTORS, INC	314
BANNERCRAFT CLOTHING CO., INC	359
BARGER, JACK R., ET AL	387
BAUER, ELDON E	276
BOISE CASCADE CORP	387
BORCHERS, GEORGE B	299
BOYCE, MARGARET, ET AL	57
BOYLAN, RAYMOND	370
BUILDERS INT'L (SENEGAL) S.A	362
BURKET, ROBERT E	327
BUSSE, MARCELLA	247
BUTKIN PRECISION MFG. CORP	110
C.H. LEAVELL & CO	
CARLIN, DANIEL S	321
CHARLEY, THEODORE E	383
CITIES SERVICE HELEX	222, 375
CITY OF PAWTUCKET	324
DELTA STEAMSHIP LINES	104
DORSEY, ARNOLD GEORGE	339
FARM & HOME ALUMINUM PROD	291
FLUTE, ALOYSIUS A. J	317
GATSON, ANDRÉ	303
GENERAL ELECTRIC CO	339
GENERAL FOODS CORP	387

	Page
GIMBEL BROS., INC	383
GORDON, WENDAL, ET AL	310
GRAFF, MARK	352
GULF + WESTERN PRECISION ENG. CO	207
HAIGHT, CHARLES H., JR	387
HARMON, HUDSON D	298
INSTRUMENTS FOR INDUSTRY, INC	364
JACK SANDERS CORP	318
JAMES MCCONNEN & SONS	334
JOHNSON, ERNIE J	388
KALVAR CORP., INC	192
KOGOK, JACK (SEE WASHINGTON MED. CENTER)	
LEAVELL, C. H., & CO	308
LEEWAY MOTOR FREIGHT, INC	343
LEVY, S. SANFORD, EXECUTOR	388
MACENTEE, ANDREW B	344
MACKIE, JOHN	387
MAJOR COAT CO., INC	1, 49
MALAJALIAN, ANTRANIK	387
MANCON LIQUIDATING CORP	333
MANUFACTURERS HANOVER TRUST CO., ET AL	372
MARTORELLI, ALFRED	331
MCCONNEN, JAMES & SONS	334
METROPOLITAN CLUB OF WASHINGTON (SEE WASHINGTON MED. CENTER).	
MOLONY & RUBIEN CONSTR. CO	293
MULLINS, EUSTACE C	306
NATIONAL HELIUM CORP	222
NEWTON, MAURICE C., ET AL	349
NORTHERN HELEX CO	387
PACIFIC FAR EAST LINE	71
PACIFIC TRANSPORT CO	99
PASCAL, HARVEY	183
PHILADELPHIA SUBURBAN CORP	354
PHILLIPS PETROLEUM CO	375
PITMAN, WILLIAM C., ET AL	357
POLLUTRO, FELIX	387
PRICE, JOHN H	293
RASMUSSEN, ALVIN L	260
RAVENNA ARSENAL, INC	367
REALE, DANTE S	387

	Page
RINGE, FRED E., JR.	387
SANDERS, JACK, CORP.	318
SCM CORP.	309
1776 K ST. ASSOC. (SEE WASHINGTON MED. CENTER).	
SHALLER, HERMAN I.	295
SHARPLES, PHILIP T., ET AL.	384
SLIMAN, MARY M.	336
SOUTHWEST ENG. CO.	337
SPOONER, WILLIAM	312
STEEN, HOWARD J.	348
STROMFIELD, RONALD J.	377
SUMMIT NURSING HOME, INC.	346
TALLEY INDUSTRIES, INC.	384
UHL, MARIE ANTOINETTE T.	360
UNION PAC. R.R.	387
VALLEY VIEW SHOPPING CENTER LTD.	385
VILLANI, KEVIN E.	329
WAGNER ELECTRIC CORP.	383
WARRIOR CONSTR., INC.	350
WASHINGTON MEDICAL CENTER, INC.	145, 379
WATHEN, SAMUEL C., JR.	387
WESTERN SHOSHONE LEGAL DEFENSE	388
WHITELEY, OCTA R.	388
WOODWARD, THOMAS JOHN	341
YOKUM, WOODROW	387
YORK, PHILIP R., ET AL.	356
ZEISSIG, K. VERNON	313
ZERBE, PAUL	358
ZUARO, ANGELO C.	342

TABLE OF STATUTES CITED

(By Case Name)

STATUTES AT LARGE

1790, July 16; ch. 28, 1 Stat. 30; Washington Medical Center
1791, Mar. 3; ch. 17, 1 Stat. 214; Washington Medical Center
1809, Jan. 12; ch. 8, 2 Stat. 511; Washington Medical Center
1848, May 17; ch. 42, 9 Stat. 223; Washington Medical Center
1882, July 6; ch. 272, 22 Stat. 151; Washington Medical Center
1892, July 22; ch. 230, 27 Stat. 255; Washington Medical Center
1901, Mar. 3; ch. 854, 31 Stat. 1426; Washington Medical Center
1905, Feb. 23; ch. 734, 33 Stat. 733; Washington Medical Center
1932, Dec. 15; ch. 4, 47 Stat. 747; Washington Medical Center
1936, June 29; ch. 858, 49 Stat. 1985; Delta S.S.; Pacific Far East Line; Pacific Transport Co.
1951, Mar. 23; ch. 15, 65 Stat. 7; Major Coat Co.
1958, Sept. 2; 72 Stat. 1644; Busse
1960, Sept. 13, 74 Stat. 918; Cities Service Helex
1962, Oct. 16, 76 Stat. 960; Pacific Far East Line
1964, Feb. 26; 78 Stat. 33; Pacific Far East Line
1970, Jan. 1; 83 Stat. 852; Cities Service Helex
1971, July 1; 85 Stat. 97; Butkin Precision Mfg. Corp.
1972, Aug. 29; 86 Stat. 652; Boyce; Rasmussen; Summit Nursing Home
1975, Jan. 2; 88 Stat. 1926; Butkin Precision Mfg. Corp.

UNITED STATES CODE

Title 5:
§§ 3346, 3348; Carlin
§ 5596(b); Rasmussen
Title 9:
§ 9; Builders Int'l
Title 10:
§ 266(a); Sliman
§ 1552; Carlin
§ 3362(b); Sliman
§ 3851(a), (c); Borchers
§ 8012(c), (e); Carlin
§ 8303(d); MacEntee

Title 26:
§§ 483, 483(f)(4), 1235(a), (b); Busse
§§ 3102(a), 3402(a); Bauer
§ 6151(a); Manufacturers Hanover Trust Co.
§ 6511; York
§ 6611(a); Manufacturers Hanover Trust Co.
§§ 6671, 6672; Bauer
§ 7422; Dorsey; Woodward
Title 28:
§ 455(a)(Supp. V, 1975); Cities Service Helex
§ 1346(a)(2), (b); Zeissig
§ 1361; Graff
§ 1491; Boyce; Builders Int'l; Burket; Gulf + Western Precision Eng.; Martorelli; SCM Corp.; Uhl; Villani; Zeissig
§ 1491 (Supp. V, 1975); Rasmussen; Summit Nursing Home
§ 1506; Allison; Graff; Zeissig; Zuaro
§ 2412; Kalvar Corp.; Rasmussen; SCM Corp.
§ 2501; Leeway Motor Freight Inc.
§ 2516; SCM Corp.
§ 2516(a); Rasmussen
Title 32:
§ 709(e)(1); Borchers
Title 33:
§ 1321(i)(1)(Supp. V, 1975); City of Pawtucket
Title 41:
§ 114(b); Philadelphia Suburban Corp.
§§ 321, 322; Gulf + Western Precision Eng.; Instruments for Industry; Warrior Constr.
Title 42:
§ 1395x(v); Summit Nursing Home
Title 46 (1964):
§§ 1101 et seq.; Pacific Far East Line
§§ 1151–1161, 1171–1183; Delta S.S.
§ 1177; Pacific Transport
§§ 1177(b), (h); Delta S.S.; (b), (c), (f) & (h); Pacific Far East Line
Title 49:
§ 304a; Leeway Motor Freight
Title 50 App.:
§ 1213(e) (1–6); Butkin Precision Mfg. Corp.
§ 1213(e), (f); Major Coat Co.
§ 1215(a), (f)(1); Major Coat Co.
§ 1215(b)(2), (f)(1); Butkin Precision Mfg. Corp.
§ 1218 (Supp. IV, 1974); Bannercraft Clothing; Butkin Precision Mfg. Corp.; Major Coat Co.

INTERNAL REVENUE CODE OF 1954

§§ 33, 37; Pacific Far East Line
§§ 38, 46–48; Delta S.S.; Pacific Far East Line; Pacific Transport
§ 46(a)(2), (b)(1); Delta S.S.
§ 46(a)(1), (c)(1), (2), (4); Pacific Far East Line
§ 48(a)(1), (2), (b), (g)(1); Pacific Far East Line
§§ 102, 103; Pacific Far East Line
§ 167; Major Coat Co.; Pacific Far East Line
§§ 362(c)(2), 1012; Pacific Far East Line
§ 6013(e); Boyce

RULES OF THE COURT CITED (1969 EDITION) (as amended)

14(b)(2); Builders Int'l
14 (d); Cities Service Helex
26(b); Bannercraft Clothing
35; Martorelli
35(a), (c); Spooner
35(g); Warrior Constr.
39(a)(1); Builders Int'l
39(b); Cities Service Helex
41(a)(1); Philadelphia Suburban Corp.
52(b)(1); Spooner
53(c)(2)(ii); Cities Service Helex
53(c)(2)(i) & (ii); Steen
54(b); Gulf + Western Precision Eng.; Price
54(b)(3); James McConnen & Sons
76(b)(3); Arey
101; Builders Int'l
101(d); City of Pawtucket
102(a)(1)(ii); Leeway Motor Freight
102(b); Mancon Liquidating Corp.
102(b)(1); Price
111(d); Mancon Liquidating Corp.
131(c); Bauer; Boyce; Cities Service Helex; Delta S.S.; Pacific Far East Line; Pacific Transport; Rasmussen
141(b); Bauer; Gulf + Western Precision Eng.
147(b); Major Coat Co.
149; Baltimore Contractors; Jack Sanders Corp.; Summit Nursing Home
150; Summit Nursing Home
150(d); Gulf + Western Precision Eng.
152(b); Washington Medical Center
162(b)(2); Warrior Constr.
163(a), (b); Warrior Constr.
163(b)(2); Jack Sanders Corp.
163(b)(3)(iii); Instruments for Industry
166(c); Warrior Constr.

DESIGNATION OF A JUDGE OF THE UNITED STATES COURT OF CLAIMS FOR SERVICE IN ANOTHER CIRCUIT

The Chief Justice of the United States, the Honorable Warren E. Burger, pursuant to the authority vested in him by Title 28, United States Code, designated and assigned the Honorable Robert L. Kunzig, a Judge of the United States Court of Claims, to act as a Circuit Judge of the United States Court of Appeals for the Seventh Circuit during the week of September 20, 1976, and for such additional time in advance thereof to prepare for the trial of cases, or thereafter as may be required to complete unfinished business.

LEGISLATION RELATING TO THE COURT OF CLAIMS

PUBLIC LAW 94-455
94th CONGRESS, H.R. 10612
OCTOBER 4, 1976

90 STAT. 1520

TAX REFORM ACT OF 1976

P.L. 94-455
Sec. 201

TITLE I—SHORT TITLE AND AMENDMENT OF 1954 CODE

SEC. 101. SHORT TITLE.

[26 USC 1 note]

This Act may be cited as the "Tax Reform Act of 1976".

SEC. 102. AMENDMENT OF 1954 CODE.

Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Internal Revenue Code of 1954.

[26 USC 1]

* * * * *

SEC. 1306. DECLARATORY JUDGMENTS WITH RESPECT TO SECTION 501(C)(3) STATUS AND CLASSIFICATION.

(a) GENERAL RULE.—Subchapter B of chapter 76 (relating to proceedings by taxpayers and third parties) is amended by redesignating section 7428 as 7430, and by inserting after section 7427 the following new section:

220-598—78——2

"SEC. 7428. DECLARATORY JUDGMENTS RELATING TO STATUS AND CLASSIFICATION OF ORGANIZATIONS UNDER SECTION 501(C)(3), ETC.

[26 USC 7428]

"(a) CREATION OF REMEDY.—In a case of actual controversy involving—

"(1) a determination by the Secretary—

"(A) with respect to the initial qualification or continuing qualification of an organization as an organization described in section 501(c)(3) which is exempt from tax under section 501(a) or as an organization described in section 170(c)(2),

"(B) with respect to the initial classification or continuing classification of an organization as a private foundation (as defined in section 509(a)), or

"(C) with respect to the initial classification or continuing classification of an organization as a private operating foundation (as defined in section 4942(j)(3)), or

[26 USC 4942]

"(2) a failure by the Secretary to make a determination with respect to an issue referred to in paragraph (1),

upon the filing of an appropriate pleading, the United States Tax Court, the United States Court of Claims, or the district court of the United States for the District of Columbia may make a declaration with respect to such initial qualification or continuing qualification or with respect to such initial classification or continuing classification. Any such declaration shall have the force and effect of a decision of the Tax Court or a final judgment or decree of the district court or the Court of Claims, as the case may be, and shall be reviewable as such.

"(b) LIMITATIONS.—

"(1) PETITIONER.—A pleading may be filed under this section only by the organization the qualification or classification of which is at issue.

"(2) EXHAUSTION OF ADMINISTRATIVE REMEDIES.—A declaratory judgment or decree under this section shall

not be issued in any proceeding unless the Tax Court, the Court of Claims, or the district court of the United States for the District of Columbia determines that the organization involved has exhausted administrative remedies available to it within the Internal Revenue Service. An organization requesting the determination of an issue referred to in subsection (a)(1) shall be deemed to have exhausted its administrative remedies with respect to a failure by the Secretary to make a determination with respect to such issue at the expiration of 270 days after the date on which the request for such determination was made if the organization has taken, in a timely manner, all reasonable steps to secure such determination.

"(3) TIME FOR BRINGING ACTION.—If the Secretary sends by certified or registered mail notice of his determination with respect to an issue referred to in subsection (a)(1) to the organization referred to in paragraph (1), no proceeding may be initiated under this section by such organization unless the pleading is filed before the 91st day after the date of such mailing.

"(c) VALIDATION OF CERTAIN CONTRIBUTIONS MADE DURING PENDENCY OF PROCEEDINGS.—

"(1) IN GENERAL.—If—

"(A) the issue referred to in subsection (a)(1) involves the revocation of a determination that the organization is described in section 170(c)(2),

"(B) a proceeding under this section is initiated within the time provided by subsection (b)(3), and

"(C) either—

"(i) a decision of the Tax Court has become final (within the meaning of section 7481), or

"(ii) a judgment of the district court of the United States for the District of Columbia has been entered, or

"(iii) a judgment of the Court of Claims has been entered,".

and such decision or judgment, as the case may be, determines that the organization was not described in section 170(c)(2),

then, notwithstanding such decision or judgment such organization shall be treated as having been described in section 170(c)(2) for purposes of section 170 for the period beginning on the date on which the notice of the revocation was published and ending on the date on which the court first determined in such proceeding that the organization was not described in section 170 (c)(2).

"(2) LIMITATION.—Paragraph (1) shall apply only—

"(A) with respect to individuals, and only to the extent that the aggregate of the contributions made by any individual to or for the use of the organization during the period specified in paragraph (1) does not exceed $1,000 (for this purpose treating a husband and wife as one contributor), and

"(B) with respect to organizations described in section 170(c)(2) which are exempt from tax under section 501(a) (for this purpose excluding any such organization with respect to which there is pending a proceeding to revoke the determination under section 170(c)(2).

"(3) EXCEPTION.—This subsection shall not apply to any individual who was responsible, in whole or in part, for the activities (or failures to act) on the part of the organization which were the basis for the revocation.".

(b) TECHNICAL AND CONFORMING AMENDMENTS.—

(1) Section 7451 (relating to fee for filing petition) is amended by inserting before the period at the end thereof the following "or under section 7428". [26 U.S.C. 7451]

(2) Section 7459(c) (relating to date of decision) is amended by inserting after "under part IV of this subchapter" the following "or under section 7428".

[26 USC 7459]

(3) Section 7476(c) (relating to use of Tax Court commissioners) is amended by striking out "this section" and inserting in lieu thereof "this section or section 7428".

(4) Section 7482(b)(1) (relating to venue for review of Tax Court decisions) is amended by striking out "or"

at the end of subparagraph (C), by striking out the period at the end of subparagraph (D) and inserting in lieu thereof ", or", and by inserting after subparagraph (D) the following new subparagraph:

"(E) in the case of an organization seeking a declaratory decision under section 7428, the principal office or agency of the organization."

[26 USC 7482]

(5) Section 7482(b)(1) is further amended by striking out "section 7476" in the last sentence and inserting in lieu thereof "section 7428, 7476,".

(6) The table of sections for subchapter B of chapter 76 is amended by striking out the item relating to section 7428 and inserting in lieu thereof the following:

"Sec. 7428. Declaratory judgments relating to status and classification of organizations under Section 501 (c)(3), etc.
"Sec. 7430. Cross references."

(7) Section 1346(e) of title 28, United States Code (relating to jurisdiction of district courts with the United States as defendant), is amended by inserting "or section 7428 (in the case of the United States district court for the District of Columbia)" immediately after "section 7426".

(8) Section 2201 of title 28, United States Code (relating to creation of declaratory judgment remedy), is amended by striking out "taxes" and inserting in lieu thereof "taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954".

(9)(A) Chapter 92 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 1507. Jurisdiction for certain declaratory judgments

"The Court of Claims shall have jurisdiction to hear any suit for and issue a declaratory judgment under section 7428 of the Internal Revenue Code of 1954.". [28 USC 1507]

(B) The table of sections for such chapter is amended by adding at the end thereof the following new item:

"1507. Jurisdiction for certain declaratory judgments."

(c) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to pleadings filed with the United States Tax Court, the district court of the United States for the District of Columbia, or the United States Court of Claims more than 6 months after the date of the enactment of this Act but only with respect to determinations (or requests for determinations) made after January 1, 1976.

[26 USC 7428 note]

* * * * *

PUBLIC LAW 94-465
94TH CONGRESS, S. 2981
OCTOBER 8, 1976

AN ACT 90 Stat. 1990

To authorize appropriations for the Indian Claims Commission for fiscal year 1977, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is authorized to be appropriated to carry out the provisions of the Indian Claims Commission Act (25 U.S.C. 70), during fiscal year 1977, not to exceed $1,650,000.

SEC. 2. Section 23 of the Act entitled "An Act to create an Indian Claims Commission, to provide for the powers, duties, and functions thereof, and for other purposes", approved August 13, 1946 (60 Stat. 1049, 1055), as amended (86 Stat. 115; 25 U.S.C. 70v), is hereby amended by striking said section and inserting in lieu thereof the following:

DISSOLUTION OF THE COMMISSION AND DISPOSITION OF PENDING CLAIMS

SEC. 23. The existence of the Commission shall terminate at the end of fiscal year 1978 on September 30, 1978, or at such earlier time as the Commission shall have made its final report to the Congress on all claims filed with it. Upon its dissolution, the records and files of the Commission in all cases in which a final determination has been entered shall be delivered to the Archivist of the United States. No later than December 31, 1976, the Indian Claims Commission may certify and transfer to

the Court of Claims all cases which the Commission determines it cannot completely adjudicate by September 30, 1978. In addition, the Commission may, at any time prior to September 30, 1978, certify and transfer to the Court of Claims any case which it determines cannot be completely adjudicated prior to the dissolution of the Commission. Jurisdiction is hereby conferred upon the Court of Claims to adjudicate all such cases under the provisions of section 2 of the Indian Claims Commission Act: *Provided*, That section 2 of said Act shall not apply to any cases filed originally in the Court of Claims under section 1505 of title 28, United States Code. Upon dissolution of the Commission, all pending cases including those on appeal shall be transferred to the Court of Claims for adjudication on the same basis as those authorized to be transferred by this section.".

SEC. 3. Section 28 of such Act of August 13, 1946, as amended (25 U.S.C. 70v–2), is amended by striking said section and inserting in lieu thereof the following:

STATUS REPORT TO CONGRESS

SEC. 28. The Commission shall, on the first day of the 95th Congress, submit a report to the Committees on Interior and Insular Affairs of the Senate and the House of Representatives on those cases which it has transferred pursuant to section 23 of this Act, as amended. In addition, the Commission shall submit a report to said Committees at six month intervals thereafter showing the progress made and the work remaining to be completed by the Commission, as well as the status of each remaining case, along with the projected date for its completion.

[25 USC 70v.]

LEGISLATIVE HISTORY:

HOUSE REPORT No. 94–1150 accompanying H.R. 11909 (Comm. on Interior and Insular Affairs).
SENATE REPORT No. 94–737 (Comm. on Interior and Insular Affairs).
CONGRESSIONAL RECORD, Vol. 122 (1976):
Apr. 9: Considered and passed Senate.
Aug. 3: Considered and passed House, amended, in lieu of H.R. 11909.
Sept. 28: Senate agreed to conference report.
Sept. 29: House agreed to conference report.

THE UNITED STATES COURT OF CLAIMS

A History

Part I

THE JUDGES
1855-1976

By

Marion T. Bennett, Judge

Published By Authorization of

THE COMMITTEE ON THE BICENTENNIAL OF INDEPENDENCE
AND THE CONSTITUTION OF THE JUDICIAL CONFERENCE
OF THE UNITED STATES

Washington, D.C.

1976

Foreword

*Wilson Cowen**

In July 1975, the Chief Justice of the United States, acting pursuant to authorization by the Judicial Conference, appointed a Bicentennial Committee. The purpose of the committee, as stated at its first meeting, "is to portray the history and significance of the judicial branch of the United States Government and its unique constitutional role as one of the coordinate branches of the government." In accordance with a resolution adopted by the Bicentennial Committee at its first meeting on July 7, 1975, the Chief Justice appointed a committee of three judges from each of the circuits and from each of the three national federal courts. The function of these committees is to collaborate with the Bicentennial Committee, with particular emphasis on the development of the history of each court. The Chief Judge, Judge Philip Nichols, Jr., and Judge Marion T. Bennett were named to the committee for the United States Court of Claims.

It was decided that the history of the court would be published in two parts. This first part contains a biographical sketch and a photograph of each judge who has served on the court and a second part, to be issued later, will be devoted to the origin, growth, and development of the court from its creation on February 24, 1855, to the present time.

The task of writing this biographical manuscript was assigned to Judge Marion T. Bennett, and he was ably assisted in the research by his secretary, Miss Dorothy I. Butts. In addition, Mrs. Cleopatra P. Stark and Mrs. Anna B. Parkes were of assistance to them in the preparation of the biographies for the printer and in the proofing.

The first judges were appointed March 3, 1855, and it was extremely difficult to obtain biographical information on some of the early judges, even after research in the Library of Congress and inquiries to historical societies, libraries, and living relatives. It was even more difficult to find photographs of some judges. In some instances, an old newspaper or magazine photograph was the only picture that could be located.

On behalf of the court, I wish to express our sincere appreciation for the great effort that has gone into the preparation of the first part of the court's history.

We also wish to thank Judge Giles S. Rich of the Court of Cus-

*Chief Judge, United States Court of Claims.

toms and Patent Appeals for his invaluable assistance in reproducing the photographs used to illustrate the biographies.

Preface

*Marion T. Bennett**

It is a truism that the human beings who serve an institution establish its character and make it what it is. This history of the United States Court of Claims, therefore, begins with the story of its judges. In researching and writing these biographies we have been impressed by the fact that the careers of the judges who have served on the court reflect, as in a mirror, the hopes and fears, the glories and griefs, and the sweep of great events that have shaped the nation. The contributions of these judges to the administration of justice have earned the court the reputation as "the conscience of the nation."

For the 121 years since its creation in 1855, the U. S. Court of Claims has been the principal forum for adjudication of civil suits for money damages against the United States. It is a court established under article III of the Constitution. Forty-seven judges have served it and have been appointed from 21 states and the District of Columbia, reflecting in part the nationwide jurisdiction of the court.

In the beginning, the court had only three judges and each received a salary of $4,000 per annum, payable quarterly. The judges chose their presiding judge, as the statute failed to provide for this. Ch. 122, 10 Stat. 612 (1855). Soon two more judges were added to the court and the President was authorized to appoint a Chief Justice. Ch. 92, 12 Stat. 765 (1863). The law was amended 85 years later to change the title to Chief Judge, reserving that of Chief Justice for the Supreme Court. Ch. 646, 62 Stat. 898 (1948). The court was later enlarged to seven judges and authorized to sit in panels or divisions of three. 80 Stat. 139 (1966).

In order to place this historical account in perspective, the biographical sketches of the 47 judges who have served the court are presented chronologically and, to the extent possible, uniform vital statistics (some in tables) are provided. Personal information of interest, where found, has also been included so that the reader may gain a better understanding of the personalities of these judges who have helped to shape the character of the court and the legal history of America.

For obvious reasons, we have not undertaken editorial comment or eulogy of living judges. For them, we have adhered to previously published facts. It was, however, difficult to restrain the almost

*Judge, United States Court of Claims.

incorrigible impulse to be enthusiastic in the expression of praise for one's associates. But, as our distinguished Chief Justice Booth said in 1915, in rejecting such a temptation:

> * * * The task of a historian is a difficult one; obligated to the highest manifestation of impartiality, a serf to investigation, duty bound to accuracy, it becomes an undertaking peculiarly adapted to one not under the influence of lasting friendship to the person of whom he writes or speaks. [50 Ct. Cl. xliii (1915).]

For those of us who have had the privilege of serving on the court, the work has had about it an element of inspiration. We submit this historical chronicle in the modest hope that in some measure the readers may share it with us.

Table of Contents

	Page
FOREWORD by Chief Judge Wilson Cowen	iii
PREFACE by Judge Marion T. Bennett	v
BIOGRAPHIES	
Chronologically: (See alphabetical listing on page ix.)	
Gilchrist, John J.	1
Blackford, Isaac N.	4
Scarburgh, George P.	10
Loring, Edward G.	14
Hughes, James	20
Casey, Joseph	26
Wilmot, David	30
Peck, Ebenezer	34
Nott, Charles C.	38
Milligan, Samuel	44
Drake, Charles D.	50
Richardson, William A.	56
Davis, J. C. Bancroft	62
Hunt, William H.	66
Scofield, Glenni W.	72
Weldon, Lawrence	76
Davis, John	80
Peelle, Stanton J.	86
Howry, Charles B.	92
Wright, Francis M.	98
Booth, Fenton W.	102
Atkinson, George W.	106
Barney, Samuel S.	110
Campbell, Edward K.	114
Downey, George E.	118
Hay, James	122
Graham, Samuel J.	126
Moss, John M.	130
Green, William R.	134
Sinnott, Nicholas J.	138
Littleton, Benjamin H.	142
Williams, Thomas S.	146
Whaley, Richard S.	150
Whitaker, Samuel E.	154
Jones, (J.) Marvin	158
Madden, J. Warren	164

BIOGRAPHIES (Cont.)

Page

Chronologically:

Howell, (G.) Evan ---- 170
Laramore, Don N. ---- 174
Durfee, James R. ---- 178
Davis, Oscar H. ---- 182
Cowen, Wilson ---- 186
Collins, Linton M. ---- 192
Skelton, Byron G. ---- 196
Nichols, Philip, Jr. ---- 200
Kashiwa, Shiro ---- 204
Kunzig, Robert L. ---- 208
Bennett, Marion T. ---- 212

TABLES

I: Judges—In Order of Appointment, By Whom Appointed, Years of Service ---- 216
II: Judges—Dates of Birth and Death, Age at Time of Death ---- 218
III: Judges—States From Which Appointed ---- 220
IV: Judges—Length of Service (In Order of Length) 221
V: Judges—Other Public Service ---- 222
VI: Judges—Lines of Succession ---- 229
VII: Judges—Composition of Court ---- 230
VIII: Judges—Judicial Service, State From Which Appointed, By Whom Appointed, Politics of Judge ---- 232

Table of Contents

Page

Alphabetically:

Atkinson, George W. ---- 106
Barney, Samuel S. ---- 110
Bennett, Marion T. ---- 212
Blackford, Isaac N. ---- 4
Booth, Fenton W. ---- 102
Campbell, Edward K. ---- 114
Casey, Joseph ---- 26
Collins, Linton M. ---- 192
Cowen, Wilson ---- 186
Davis, J. C. Bancroft ---- 62
Davis, John ---- 80
Davis, Oscar H. ---- 182
Downey, George E. ---- 118
Drake, Charles D. ---- 50
Durfee, James R. ---- 178
Gilchrist, John J. ---- 1
Graham, Samuel J. ---- 126
Green, William R. ---- 134
Hay, James ---- 122
Howell, (G.) Evan ---- 170
Howry, Charles B. ---- 92
Hughes, James ---- 20
Hunt, William H. ---- 66
Jones, (J.) Marvin ---- 158
Kashiwa, Shiro ---- 204
Kunzig, Robert L. ---- 208
Laramore, Don N. ---- 174
Littleton, Benjamin H. ---- 142
Loring, Edward G. ---- 14
Madden, J. Warren ---- 164
Milligan, Samuel ---- 44
Moss, John M. ---- 130
Nichols, Philip, Jr. ---- 200
Nott, Charles C. ---- 38
Peck, Ebenezer ---- 34
Peelle, Stanton J. ---- 86
Richardson, William A. ---- 56
Scarburgh, George P. ---- 10
Scofield, Glenni W. ---- 72
Sinnott, Nicholas J. ---- 138
Skelton, Byron G. ---- 196

Page

Alphabetically:

Weldon, Lawrence 76
Whaley, Richard S. 150
Whitaker, Samuel E. 154
Williams, Thomas S. 146
Wilmot, David 30
Wright, Francis M. 98

John James Gilchrist

John James Gilchrist

NEW HAMPSHIRE

1st Judge—1855–1858
1st Presiding Judge

John James Gilchrist was born in Medford, Massachusetts, on February 16, 1809. He was the son of Capt. James and Susan (Wyman) Gilchrist. His father was a shipmaster by profession and upon his retirement lived on a farm at Charlestown, New Hampshire. John James received much of his early education from a tutor, the village clergyman, and thereafter entered Harvard College from which he graduated in 1828. He received an honorary LL.D. degree from Harvard in 1856 and from Dartmouth College in 1852. An early biographer tells us that in college "young Gilchrist won many friends by his sterling qualities, and without being overly ambitious to excel, maintained a good rank, especially in certain studies congenial to his tastes, and was noted as a great reader."

John James Gilchrist commenced the study of law in the offices of William Briggs of Charlestown. He then entered Harvard Law School for further legal studies and was admitted to the Massachusetts bar in 1831. He was fortunate in becoming a partner of Gov. Henry Hubbard in Charlestown and prospered as a lawyer in New Hampshire. He married the Governor's daughter, Sarah Dean, on August 25, 1836, and they were the parents of two children, James and Sarah.

In the early years of his legal career, Gilchrist devoted himself to becoming familiar with the legal and business requirements of a general practice. His professional progress was rapid. Turning his attention also to public affairs, he was chosen in 1836 and again in 1837 as a representative in the State legislature of New Hampshire. In 1836 he was also appointed register of probate and served as well as a *nisi prius* judge and for a time as county solicitor. As a county solicitor, he was a strict enforcer of the criminal laws. The experience of serving as a judge determined his career. He loved it and decided that it should be his life's work. He provided himself with an ample law library and studied judicial procedures. He became a popular judge with his associates and the public. Of his demeanor it was said:

> His manner on the bench was such as to conciliate the goodwill of all, and to inspire confidence. His temper was mild, and he never permitted it to be ruffled. If any heat was

generated by the friction of a trial, it never reached the bench. He treated the members of the bar with politeness and attention. No one of them went away sorrowful from the conviction that his case had not had a fair consideration by the judge.

In 1840 Judge Gilchrist was appointed as an associate justice of the New Hampshire Supreme Court, then known as the Superior Court of Judicature. This distinction came to him after only nine years as a member of the bar. In 1848 he became Chief Justice of the court. While an associate justice he performed an important service to the legal profession by preparing a digest (1846) of the cases in the 12 volumes of the Superior Court's Reports which had been published up to that time. This digest bears his name.

On March 3, 1855, President Franklin Pierce appointed Chief Justice Gilchrist as one of the first three judges of the United States Court of Claims which had been established by the Act of February 24, 1855, ch. 122, 10 Stat. 612. At the first session of the court on May 11, 1855, Judge Gilchrist was chosen by his two associates, Isaac N. Blackford and George P. Scarburgh, as the first presiding judge of the Court of Claims. He at once devoted himself to the work of the new federal court. However, he died prematurely on April 29, 1858, in Washington, D.C., at only 49 years of age. He was succeeded on the court by Edward G. Loring of Massachusetts.

On May 3, 1858, the JOURNAL of the court, volume 2, records the passing of Judge Gilchrist and the proceeding before the court, at which time tributes were paid to him by the Honorable Montgomery Blair, United States Solicitor, and members of the Court of Claims bar. Judge Isaac Blackford, who sat on the court with Judge Gilchrist and who was appointed on the same day as Gilchrist, spoke for the court. The service of Judge Gilchrist on the Court of Claims was marked with distinction and was applauded by his colleagues and the bar. His leadership in getting the court started on its course was effective. His experience as the Chief Justice of the highest court of his state served him well in Washington and was invaluable to the Court of Claims. Those who paid tribute to him remarked upon his cultivation of the classics, his patience and legal scholarship, his great integrity, and his devotion to public service. An early biographer stated: "His disposition was social and genial, and his sense of humor combined with it to make him a most agreeable and entertaining companion. In all his instincts and habits he was a thorough gentleman, urbane, hospitable, and high minded."

References: U.S. COURT OF CLAIMS REPORTS, Vol. 17; 2 Ct. Cl. JOURNAL 45–49 (May 3, 1858); 2 APPLETON'S CYCLOPEDIA OF AMERICAN BIOGRAPHY

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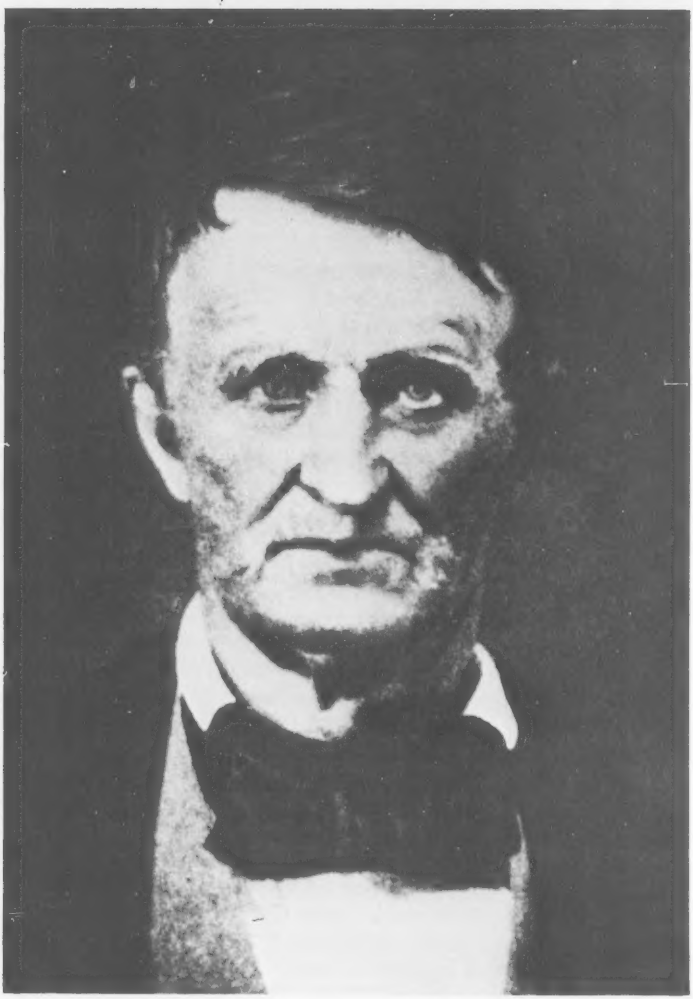


Isaac Newton Blackford

Isaac Newton Blackford

INDIANA

2d Judge—1855–1859
2d Presiding Judge

Isaac Newton Blackford was born in Bound Brook, Somerset County, New Jersey, on November 6, 1786. He was the son of a private in the Continental Army of the Revolution, Joseph Blackford (1757–1800), and Mary (Staats) Blackford (1767–1827), and was the only judge of the Court of Claims to have been born in the 18th century. The Blackford family records in New Jersey date back to the 1600's. Joseph, a successful merchant, died when Isaac was only 13 years old.

Isaac enrolled in Princeton College at 16 years of age and graduated with honors in 1806, having distinguished himself for scholarship in difficult subjects. Several other members of this class became famous as governors, senators, and jurists. In his senior year, Blackford read BLACKSTONE'S COMMENTARIES and decided to become a lawyer. He subsequently studied law under Col. George McDonald of Somerville and Judge Gabriel Ford of Morristown, New Jersey, and was admitted to the New Jersey bar in 1810. Judge Ford was perhaps the foremost lawyer in New Jersey at the time. As a history buff, Blackford was intrigued by the fact that Judge Ford's home at Morristown had once been the headquarters of General Washington. Blackford recounted that he once slept in Washington's bed and that the furniture in the room, even the carpet on the floor, was the same as when the General and his wife occupied the room.

Blackford headed west to begin his legal career. In 1812, by horseback and on foot, he reached Olean Point on the Allegheny River (now near Oil City, Pennsylvania) and floated down that river and the Ohio on a flatboat to his destination—the Territory of Indiana, whose capital was Corydon. He was admitted to the bar in Indiana in 1812. Indianapolis, later to be the principal scene of his judicial career, was not yet founded. The territory had only about 25,000 inhabitants and 10 counties. Indians remained hostile. The Battle of Tippecanoe near Lafayette, Indiana, had been fought in 1811, and the second war with Great Britain further added to Indian unrest. Blackford moved about the territory looking for a foothold, remaining briefly in Lawrenceburg and Brookville. At Vevay he was a cashier of the territorial bank, and at Vincennes he was the editor of a newspaper. In 1813 he

became the first clerk and recorder in Washington County, the county seat of which was Salem, and in 1814 he was chosen clerk of the Territorial legislature but soon resigned to accept an appointment from the Governor as a judge of the First Circuit, the position he held until 1816. He lived at this time in Vincennes, Knox County.

Indiana became a state on December 11, 1816, and Blackford was elected to the legislature. In 1817, in his 31st year, he was elected the first speaker of the Indiana House. In the same year Governor Jennings appointed Blackford, over Blackford's protest of inadequacy for the position, as one of the three judges of the Supreme Court of Indiana, and he remained on the court under successive appointments for over 35 years, serving from September 10, 1817, to January 2, 1853. As a judge of Indiana's highest court, Blackford was an instant success, winning the admiration of the people of the infant state. A county in Indiana was named after him, as well as the town of Blackford, Kentucky, which was just over the Indiana border. It is said his name was a household word. He assumed the responsibility of preparing and publishing the first eight volumes of the Indiana Supreme Court Reports, with annotations. They were known as "Blackford's Reports" and their scholarship gained him renown in the East and even at Westminster. The eight volumes contain 905 of his opinions, or about 25 per year for his total tenure. Historians, who have written much about Judge Blackford, record that he was a slow, careful judge with a gift for clear, concise expression and that he tolerated no errors of grammar. Indeed, he edited the opinions of his two colleagues. He held out a standing cash reward for any errors found in his writings.

In 1825, without his authority and without consultation with him, he was nominated by the Whig Party for Governor, but narrowly lost the election. His candidacy thrust him forward at the next session of the legislature for consideration as a United States senator. He was defeated in the legislature by one vote. It is easy to speculate that had he arrived on the national scene at this time, when he was only 40 years old, this extraordinary jurist would have found his way to a seat on the United States Supreme Court.

A new State constitution was adopted in 1851 which required the judges of the Indiana Supreme Court to be elected by popular vote. Judge Blackford had become something of a judicial hermit, acclaimed by the bar of the state, but was unknown to many of the new people who had moved to Indiana. He shunned public appearances, devoting his energies to exhaustive legal research. Timid and reserved, he was defeated in the election. His last

term ended on January 3, 1853, at the age of 67. He then undertook to practice law but the effort was not a success. The qualities of judicial reserve which had made him a good judge left him a poor advocate and politician. Not without friends, however, he was a candidate for nomination to Congress against the incumbent, the Honorable Thomas A. Hendricks. After 32 ballots he lost at the convention. Hendricks then lost the General Election but later he became a U.S. senator (1863), Governor (1872), and 32 years after the political battle with Blackford became Vice President (1884) in Cleveland's first administration. Judge Blackford also failed in a bid for the State senate. However, President Franklin Pierce appointed this experienced jurist to the bench of the new United States Court of Claims on March 3, 1855.

Judge Blackford served with distinction as a federal judge until his death in Washington, D.C., on December 31, 1859, at 73 years of age. At that time he was the presiding judge of the court, having succeeded Judge John J. Gilchrist, who was the first presiding judge until his death in 1858. A memorial service was held at the court on January 5, 1860, attended by judges and members of the bar. Judge Blackford was succeeded by James Hughes, also of Indiana.

In 1819 the judge revisited the home of his first preceptor, Col. George McDonald in New Jersey, and fell in love with the colonel's daughter, Caroline. A year later they were married but on May 30, 1821, she died in childbirth at only 20 years of age. She left a son, George, who did not live to manhood. The judge was 14 years older than his bride, and her death, and later that of his only son, caused the judge to be overcome with grief. He stayed in his solitary room in Indianapolis for many days, subsisting on crackers and cheese until anxious friends intervened. Thereafter, he buried himself in the law and never remarried.

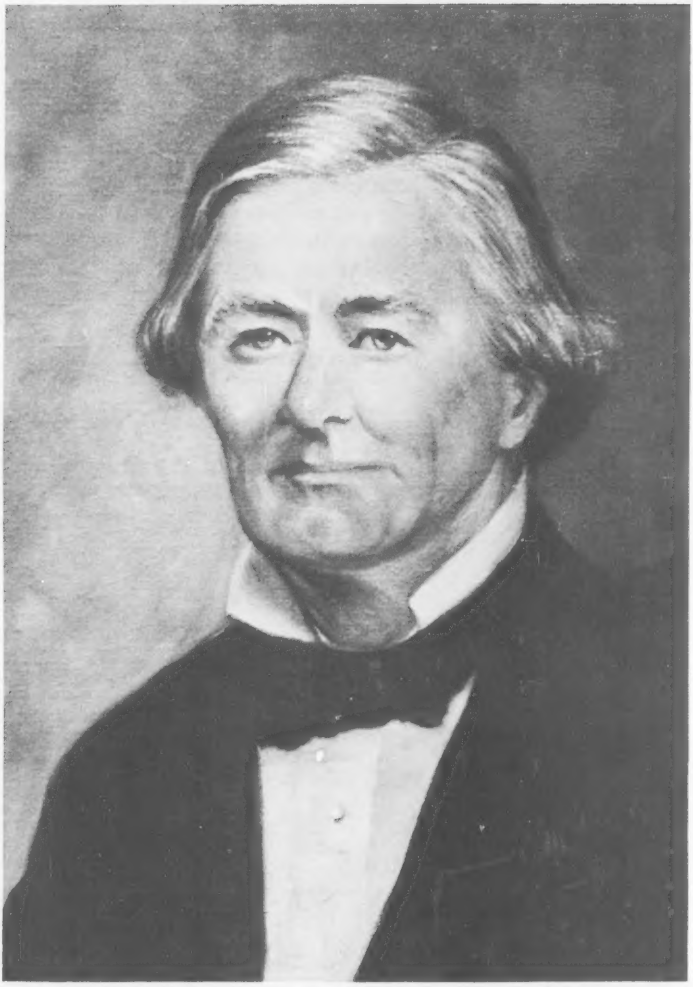
Much has been written about this famous judge who helped bring law to the frontier and, in doing so, achieved fame. He also achieved fortune, although he was indifferent to the ordinary commercial transactions of life. He often allowed his salary as a judge to remain in the State treasury for up to four years at a time. He distrusted banks from his early days as a cashier when he uncovered a fraud by the officers of the bank. He was known as a man of strictest economy and lived modestly and shunned social activity. All of his investments were in real estate, and in this he showed great shrewdness. Although his salary as a judge for over 35 years averaged $1,000 per year, his estate when he died exceeded a quarter of a million dollars, which in 1859 was a considerable fortune. His estate was inherited by a half sister.

A few things more must be said about Judge Blackford. He was a man of religious disposition, regularly attending a Presbyterian Church, although not as a member. A man of uncommon industry, he would not work on Sunday. Judge Blackford abandoned the Whig Party and Governor Harrison, who was that party's candidate for President in 1836, because he opposed slavery while Harrison favored its introduction into Indiana. Judge Blackford joined the wing of the Democratic Party opposed to slavery, and the only public speech he is recorded as having made was in opposition to slavery.

Judge Blackford's remains were returned to Indianapolis where additional high honors were paid to him by the bench and bar and by the Indiana congressional delegation. One eulogy stated: "He has contributed more than any one man in Indiana to the high character of her judicial reputation." He was laid to rest in Crown Hill Cemetery, and upon the grave stands a monument which chronicles the leading events of his life and ends as follows:

> The honors thus conferred were the just rewards of an industry that never wearied, of an integrity that was never questioned.

References: U.S. COURT OF CLAIMS REPORTS, Vol. 17; 11 NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 490; 1 APPLETON'S CYCLOPEDIA OF AMERICAN BIOGRAPHY 273; 2 Ct. Cl. JOURNAL 182–183 (Jan. 1860); W. D. LEWIS, GREAT AMERICAN LAWYERS, Vol. III at 187–212 (1908); 5 Somerset Co. (N.J.) Hist. Q. 1–14 (Jan. 1916).



George Parker Scarburgh (Scarborough)

George Parker Scarburgh (Scarborough)

VIRGINIA

3d Judge—1855–1861

George Parker Scarburgh (Scarborough) was born in Accomack County, Virginia, on February 11, 1806. He was the son of George and Anne (West) Scarborough and had five sisters: Ann, Susan, Cassandra, Elizabeth, and Catherine. He was the grandson of Capt. Americus Scarborough II (1750-1818). Beyond these ancestors he was a direct descendant of the famous Col. Edmond Scarborough of Accomack County, who came to this country from England in the 17th century. The colonel was married to Mary Littleton, also of England. Edmond, who died in 1753, was a colonel of the Virginia militia, a surveyor general of the colony, and the King's collector of quit rents. He was also the largest land and slave owner on the Eastern Shore and exercised almost feudal powers in the colony as a representative of the King. This historical figure, about whom much has been written, was constantly embroiled in controversy, especially with the neighboring State of Maryland, as well as with the Indians, Puritans, and Quakers whom he regarded as his special enemies—perhaps deservedly so, as he tended to set land boundaries to suit his personal interests. He was kept in power and avoided punishment through the influence of his brother, Sir Charles Scarborough, Court physician at the Court of St. James. This is mentioned only to underscore the fact that the judge came from a family with roots as deep in Virginia as possible at the time, dating back through the centuries, and that this may have accounted in part for the frame of mind that led to the extraordinary action taken by Judge Scarburgh in 1861, to which reference is made hereafter.

Judge Scarburgh was educated at Margaret Academy in his native county and studied law in the office of Thomas R. Joynes, whose daughter, Mary Stockley Joynes, he married on October 10, 1833. They had five children: Dr. George, Thomas, Sarah, Southy, and Charlotte. At 21 years of age he began the practice of law and continued therein until 1844 when he was elected by the Virginia Legislature to be a judge of the then Third Circuit Superior Court of Law and Chancery. In 1851 he was elected to a law professorship at William and Mary College, Williamsburg, Virginia. The professorship held by Judge Scarburgh was the Chair of Law and Police established at William and Mary in 1779

through the influence of Thomas Jefferson. The famous George Wythe, Jefferson's law teacher, was the first incumbent, succeeded by other distinguished legal scholars. This chair is said to be next only, in point of beginning, to Sir William Blackstone's at Oxford. On June 29, 1852, according to the faculty minutes, Judge Scarburgh was awarded the honorary degree of LL.D.

On March 3, 1855, President Franklin Pierce made his nominations for the first judgeships on the U. S. Court of Claims, which had been established by Congress in February of that year. The nominees were: John J. Gilchrist of New Hampshire, Isaac N. Blackford of Indiana, and Joseph H. Lumpkin of Georgia. The nominees, all of whom had served, or were serving, on the highest courts of their respective states, were confirmed on the day of their nominations. Judge Lumpkin was the first Chief Justice of the Supreme Court of Georgia, established in 1835, and served in that capacity until his death on June 4, 1867. Although confirmed, he declined to serve on the Court of Claims. Apparently he preferred his work on the Supreme Court of Georgia because in 1860 he also declined election as chancellor of the University of Georgia. It would be 109 years, however, before another Georgian, Linton McGee Collins, would be appointed to the Court of Claims.

In any event, this untoward development caused only a brief delay in the organization of the new court. President Pierce made an interim appointment on May 8, 1855, of Judge Scarburgh, and he was confirmed on January 22, 1856, by the Senate at the next session. He was present, however, at the organizational meeting of the Court of Claims on May 11, 1855, as shown by the JOURNAL of the court on that date. On May 12, 1855, the law class of William and Mary College met and adopted a resolution praising their professor and expressing their regret at his leaving. As a token of esteem he was presented with a fine cane "made of black ebony with a heavy gold head."

Judge Scarburgh's name appears on the official JOURNAL of the Court of Claims until April 11, 1861. When confronted with the choice of remaining loyal to the Union or to Virginia, he went home. He may have left hurriedly. The records of the court do not disclose his resignation. The first shot of the Civil War was fired on Fort Sumter on April 12, 1861. Judge Scarburgh never returned. He was succeeded by Joseph Casey of Pennsylvania.

Judge Scarburgh practiced law during the Civil War in Halifax and adjacent counties. In 1865 he moved to Norfolk where he practiced law until January 1, 1877, when he was appointed to the judgeship of the Corporation Court of that city. His courtroom was in the old courthouse, now the memorial to Gen. Douglas MacArthur. He continued in that position until his sudden death

on December 21, 1879, at age 73. He, his wife, and two of their children are buried in Elmwood Cemetery, Norfolk, Virginia.

Such records as are available to us about Judge Scarburgh tell us that he was a highly esteemed man, kind, genial, incorruptible, active in the Presbyterian Church, a Mason (Owens Lodge No. 164), and a leading citizen of his state and city. His death received extensive local publicity in the Virginia newspapers. The bar association and the city council held special meetings and adopted appropriate resolutions commending his virtue of character and long judicial service. A United States circuit judge spoke eloquently about him. Regrettably, these accounts give us more rhetoric than vital statistics. This is not to detract from the obvious sincerity of the tributes which are remarkable for the depth of their praise of this man. The flags on public buildings in the city were lowered in his honor. Pursuant to a resolution of the bar association, its members wore crepe on their left arms for 30 consecutive days following his death. One of the tributes paid to him, in the stilted language of that day, describes him in his prime as "the facsimile in manly dignity of the late President Fillmore * * * when his ample locks were unacquainted with the frosts of years." Another spoke of his "patriarchal countenance, his kindly eyes beaming with a mild and beneficent light and his noble head crowned with a wealth of flowing white hair; * * * the face of a scholar, and a thinker, and a Christian, * * * was set in a frame which told us that Time adorned the ruin which it made."

On May 29, 1967, at a ceremony arranged by the Norfolk and Portsmouth, Virginia, Bar Association, a life-size oil portrait of Judge Scarborough (Scarburgh) was presented to the Corporation Court (Circuit Court of the City of Norfolk, Fourth Judicial Circuit, since July 1, 1973) by his great-grandson, Carlton Scarborough Stublen of Portsmouth, Virginia. The portrait now hangs in the circuit court in Norfolk.

References: U.S. COURT OF CLAIMS REPORTS, Vol. 17; J.A. Hoyt, *Judge George P. Scarburgh*, 60 VA. MAG. OF HIST. AND BIOGRAPHY 175–177 (Jan. 1952); 4 VA. MAG. OF HIST. AND BIOGRAPHY 318 (Jan. 1897); SCARBOROUGH, 3 SOUTHERN KITH & KIN 16–17 (1951); DONALDSON, SQUIRES & DAMES OF OLD VIRGINIA at 16, 259 (1950); Norfolk Landmark, Dec. 23, 1879; Norfolk Virginian, Dec. 23 and 24, 1879; 4 WM. & MARY Q., Series 1 (July 1895); 14 WM. & MARY Q., Series 1 (July 1905); Va. State Hist. Soc'y.

Photograph through the courtesy and assistance of the Director, Eastern Shore Pub. Library, Accomac, Va.; Carlton S. Stublen, Jr., Portsmouth, Va., great-great-grandson; Charles M. Abramovitz, Virginia Beach, Va.; and the Circuit Court of the City of Norfolk, Va.

Edward Greely Loring

Edward Greely Loring

MASSACHUSETTS

4th Judge—1858–1877
3d Presiding Judge

Edward Greely Loring was born on January 28, 1802, in Boston, Massachusetts. After graduating from Harvard College with an A.B. in 1821, he studied law at the law school in Litchfield, Connecticut, and entered the office of his cousin, Charles Greely Loring, in Boston. He was admitted to the Suffolk County bar in 1824 and then opened an office of his own and became a master in chancery. He joined the New England Guards and was made the commander of his company in 1829. Loring was appointed a United States commissioner in 1840 and became judge of probate for Suffolk County in 1847, serving in that position for eight years. He was a member of the Boston school committee in 1846–1847, during which time he wrote several reports suggesting reforms that were adopted, and was a lecturer at Dane Law School at Harvard from 1852 to 1855.

On May 6, 1858, Edward G. Loring was commissioned a judge of the United States Court of Claims by President James Buchanan and from 1859 to 1863 he was presiding judge of the court, the third and last judge to hold that title. Thereafter, Congress provided for presidential appointment of a Chief Justice of the U.S. Court of Claims, ch. 92, 12 Stat. 765 (1863). He retired from the bench on December 14, 1877, having served over 19 years. When he took his seat on the court on May 19, 1858, he succeeded Judge John J. Gilchrist, deceased, who had been the first presiding judge, and was in turn succeeded by J. C. Bancroft Davis of New York. Judge Loring died on June 19, 1890, at 88 years of age, and was survived by his wife and three of their eight children. Before her marriage in 1829, Mrs. Loring was Harriet Boott, daughter of Francis and Mary Boott of Boston and granddaughter of Kirk Boott who came from Derby, England. Harriett Boott was born in 1808.

Judge Loring believed in a literal interpretation of the law and had respect for its technicalities. It was his adherence to constitutional law, as he understood it, which brought him to the brink of professional disaster in his native state but which later occasioned his elevation to the federal bench and to a long, honorable career in the Nation's Capital. In 1854 Judge Edward Greely Loring became embroiled in one of the most sensational

trials in the history of the Commonwealth of Massachusetts, with himself as the defendant. He was tried and on March 19, 1858, was removed from his position as judge of probate, which he had held since 1847. The trial was brought on by public petitions to the legislature, which heard the case, and "addressed" the Governor to remove the judge from the position to which he had been appointed for a term of "good behavior." The case arose from administration of the Fugitive Slave Law. Congress gave United States commissioners power to enforce the law. Those commissioners were known popularly as "slave commissioners." Loring was such a commissioner as well as probate judge.

A slave named Anthony Burns, belonging to Col. Charles F. Suttle of Alexandria, Virginia, had escaped to freedom in Massachusetts and resided in Boston. Found there by his owner, he was arrested on May 24 and brought before Judge Loring on May 27, 1854. The hearing verified ownership, and Burns was ordered returned to his master's custody. This was the second time Loring had issued such an order. The first was in the *Sims* case in 1851. Boston citizens at once started a movement to raise funds to purchase Burns and to set him free. Judge Loring came under intense criticism but he held that, having taken an oath to uphold the Constitution and the laws of Congress as a commissioner, he had no other choice. But, he did not reckon with Wendell Phillips, lawyer, abolitionist orator, and Boston reformer who attended the hearing and found much fault with it. Two of the faults were that Burns had not been represented by counsel nor had he been afforded a jury trial. Actually, the slave, who admitted Suttle's ownership, had been told by Loring that he was entitled to counsel but declined it. Phillips said he did so "in terror of his circumstances." Another prominent lawyer present at the hearing was Richard Henry Dana, Jr., distinguished international lawyer, later a jurist, who was the grandson of the Chief Justice of the Massachusetts Supreme Court and who gained further fame as the author of TWO YEARS BEFORE THE MAST, a classic sea story describing his life at sea as a youth. Mr. Dana, as a friend of the court, and with the full cooperation of Judge Loring, consulted with Burns, gathered evidence in his behalf, and gained a delay in the proceedings. Although the judgment eventually went against him, wrongly he thought, he defended the judge later before the legislature, when the matter of Loring's removal from office arose, even though he was not employed to do so. His defense was one of confession and avoidance. He decried the fact that Judge Loring held a federal office which put him in the untenable position of going against the sentiments of Massachusetts, a free state. He called upon the legislature to outlaw the holding

of such dual responsibilities but to maintain the independence of the judiciary by keeping Judge Loring in office. The judge took no fees for performing as a "slave commissioner." Dana spoke highly of the honor and abilities of Judge Loring who, incidentally, was also lecturing in law at the time at Harvard College.

Mr. Phillips denounced Loring in great particular, claiming many violations of law, ethics, and religious and political sentiments of the state whose "ermine" he was said to have disgraced by lack of humanitarianism, a requisite in a judge who must sit in judgment on the cases of widows and orphans. The whole affair from the hearing in the courtroom to the one in the legislature was attended by expression of violent public interest and passions, resulting even in the death of an assistant marshal and the wounding of others when a mob formed at Faneuil Hall and attacked the courthouse where Burns, the slave, was held. The life of Judge Loring was threatened, and he was badly treated.

The orations to the legislature by Phillips and Dana are learned and eloquent in their discussions of the independence of the judiciary, and in their analysis of the many other constitutional and procedural issues involved, touched on only lightly here. They were men of towering abilities, and the cause was one which brought out the legal genius in each. The dark clouds of the Civil War were showing on the horizon. Phillips relied on theories of states' rights to win his case, as the Southern States would later do in losing theirs. The implications of the action against Loring transcended the fate of the probate judge. Fortunately, the perceptive, historic addresses of Phillips and Dana are preserved for posterity in the Library of Congress.

In concluding this reference to Judge Loring and the *Burns* case, we note that, notwithstanding the demand of the legislature, Gov. Henry J. Gardner refused to execute its will, believing that Loring had upheld the law and, further, that his act was performed not in the capacity of a judge of probate but of a United States commissioner, over whose conduct in office the state had no control whatsoever. But, the matter was the big campaign issue in Massachusetts in 1857, and the Governor's stand cost him reelection. A new legislature and Governor came into office in 1858, burning with vengeance against Loring. The new Governor removed the judge and, just to make sure that the action would stand, the legislature abolished all probate judgeships in the state and consolidated the office with those of courts of insolvency. To the new office of combined judgeships, only four of the 27 judges who had lost their positions were reappointed and one of them was William Adams Richardson, later Judge Loring's colleague on the Court of Claims. Judge Richardson was the author of the

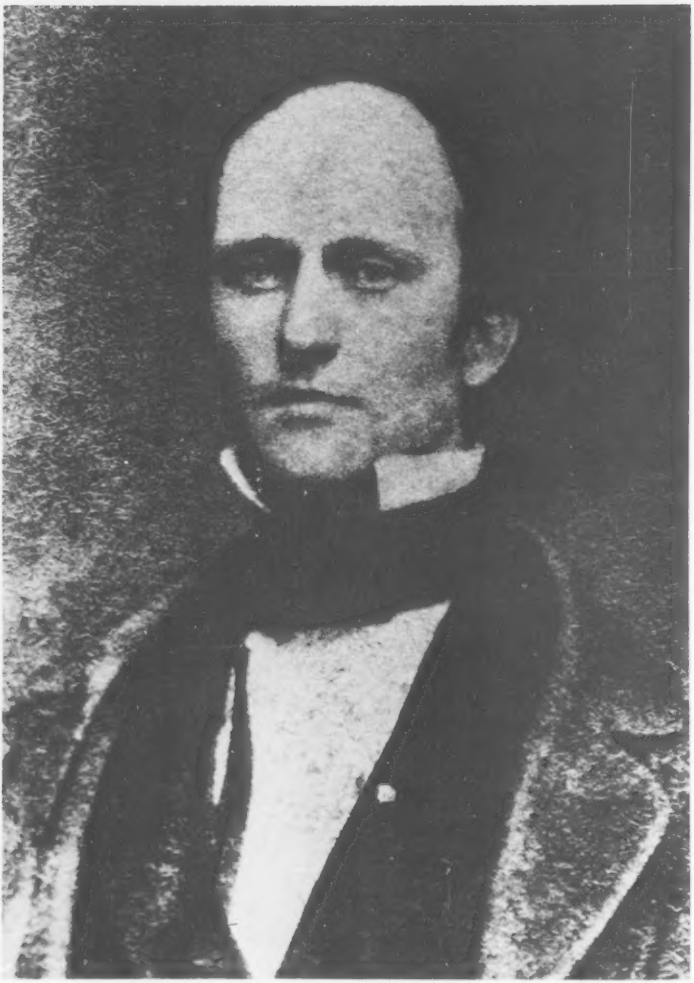
plan to abolish the probate judgeships and to combine their duties with those of judges of insolvency. It remains only to be added that the abolitionists exacted their last pound of flesh in punishing Judge Loring by denying him confirmation to a full professorship at Harvard College. The Massachusetts Senate was then a part of the Harvard Board of Overseers. This travail of Judge Loring in Boston made him a hero in the South and led President Buchanan, a Southern sympathizer, to name him to the Court of Claims in Washington, D.C.

In July 1847, Judge Loring and a friend, George B. Emerson, a noted author and educator, bought 48 acres of land on the harbor shore at Winthrop, Massachusetts, and each built a large home, landscaping and planting the area with many rare shrubs, flowers, and trees. The judge spent his last years at this home on the shore and died there. This land now comprises Court Park, and one of the streets is named Loring Road.

An oil portrait of Judge Loring was bequeathed to the Winthrop, Massachusetts, Public Library in the will of Judge Loring's daughter, Harriet B. Loring of Washington, D.C. This portrait was graciously loaned to the court for public exhibition as a part of the nation's bicentennial observance.

References: U.S. COURT OF CLAIMS REPORTS, Vols. 13, 17; *Argument of Wendell Phillips, Esq., before the Committee on Federal Relations of the Mass. Legislature in Support of the Petitions for Removal of Edward Greely Loring from the Office of Judge of Probate* (Feb. 20, 1855); *Remarks of Richard Henry Dana, Jr., Esq.*, before the same committee (Mar. 6, 1855); MYERS, CHILDREN OF PRIDE at 1598 (1972); F. W. HACKETT, A SKETCH OF THE LIFE AND PUBLIC SERVICES OF WILLIAM ADAMS RICHARDSON at 47–50 (1898); POPE, LORING GENEALOGY at 170–173, 266 (1917); Harvard Univ. Archives, Cambridge, Mass.

Portrait and photograph courtesy of Trustees of the Winthrop, Mass., Pub. Library through the assistance of Philip Nichols, Jr., Judge, U.S. Court of Claims, from Mass., and Caleb Loring, Jr., Boston, Mass.



James Hughes

James Hughes

INDIANA

5th Judge—1860–1864

James Hughes was born on November 24, 1823, in Bladensburg, Maryland. Little is now known of his parentage or family, but his mother took him to Bloomington, Indiana, when he was a child, and she died soon thereafter. The child was raised by Indiana relatives. He attended Indiana University at Bloomington and the United States Military Academy at West Point. He resigned from the Academy before graduation, having decided against a military career. He returned to Indiana where he studied law and was admitted to practice in 1842 at 19 years of age. Toward the end of the Mexican War, James Hughes was appointed a lieutenant in the 10th Regulars but this regiment of Indiana and Kentucky volunteers, of which his company was a part, got no farther than New Orleans. This was perhaps fortunate. Historians tell us that it was a political regiment officered entirely by ambitious Democratic politicians of no military experience, but all strong supporters of President Polk. Political bickering and posturing for the favorable attention of the administration hindered its effectiveness.

Resuming the practice of law in Bloomington, with a branch office at Bedford, James Hughes, an ardent Democrat, won the nomination for the judgeship of the Sixth Judicial Circuit against the Democratic incumbent on the issue that the judiciary should be rescued from politics and elevated by the election of Hughes. In preparation for this campaign—and careful preparation marked all of his political adventures—Hughes did not rely entirely on his reputation as a lawyer, although he had been quite successful. He also edited a Democratic newspaper in which he sponsored the cause for a nonpartisan judiciary and, incidentally, his own cause with what was described by observers as "fearful, forcible and convincing rhetoric."

James Hughes was elected and served his circuit from 1852 until 1856 when he resigned. Contemporary accounts describe him thusly: "He was an able but opinionated judge, who won the respect of the lawyers that rode the circuit with him though they resented his arbitrary methods." Another wrote: "As a judge he was upright, bold, courageous and tyrannical. * * * He ruled the bar and controlled the proceedings with a rod of iron." To seek

a change of venue from his court was considered a personal affront. On one occasion he had a grand jury investigate a lawyer who prepared, and had his client sign, an affidavit in an attempt to disqualify Judge Hughes. Hughes said he could not be biased because he did not know the man. He instructed the jury strongly on the law of perjury and subordination of perjury. Nothing came of it, except a terrorized bar. Many are the stories arising from the conduct of this controversial and picturesque character. One of his many pet hates was the Indianapolis & Terre Haute Railroad, often a defendant before him. One day the judge missed the train because he was a little late in getting to the station. When he got to Brazil, Indiana, by other means and in a bad mood, he opened court and called all of the cases involving the railroad first. The railroad's counsel was not yet present so the judge entered three default judgments against the railroad. When some member of the bar had the temerity to suggest that counsel would soon be there, and it might be well to wait, he quietly responded: "The railroad does not wait on the court, and the court will not wait on the railroad." He continued to enter defaults against the company. His career on the bench was rather stormy although his knowledge of the law and his abilities were not questioned. From 1853 to 1856 he also taught courses in law at Indiana University.

Elected as a Democrat to the 35th Congress from the then Third District, he served but a single term (March 4, 1857–March 3, 1859), being defeated by a Republican for reelection in 1858. The defeat was attributed to his proslavery views and the split in his party over that issue. Of his term in Congress, it is written: "With plenty of confidence in himself, he was very active throughout both sessions. He did not hesitate to enter into debate with any member and rose to object so often that his colleagues expected him to protest at every opportunity." James Hughes was a master of invective and sarcasm, a powerful public speaker, and a hard-driving, ambitious man who denounced both friend and foe if they got in his way. He was continually in a quarrel about something and with somebody—sometimes challenging foes to a duel, in lieu of denouncing them from the stump or by circular. These duels were never carried out, but one time a foe accepted the challenge and named, as the weapons of his choice, double-barreled shotguns at ten paces. Before this slaughter could take place, friends arranged a truce.

Judge Isaac N. Blackford of Indiana had died on December 31, 1859, and his seat on the Court of Claims was awarded to James Hughes on January 20, 1860, by President James Buchanan who had been strongly supported by Hughes during his brief congres-

sional career. Hughes was only 36 years of age when appointed. Service on the court was too tame for this man and he resigned in December 1864. He was succeeded by Charles Cooper Nott of New York, an appointee of President Lincoln. Judge Hughes then practiced law in Washington, D. C., with the firm of Hughes, Denver & Peck and served, also, as cotton agent for the Treasury Department. Judge Hughes and his partners represented Henry Wirz who was tried, convicted, and hanged in Washington, D.C., in 1865 for murders alleged to have been committed by him or under his direction as commandant of the Andersonville, Georgia, camp for Union prisoners during the Civil War. Over 13,000 soldiers perished there. Hughes withdrew as counsel after the first day of the trial, leaving the conduct of the case to his partners. The trial, which was before a military court, was held in the courtroom of the Court of Claims when the court occupied quarters in the Capitol Building.

While Judge Hughes believed in and upheld slavery, he put the Union first. The Civil War modified his political views, and he became no less extreme and uncompromising as a Republican than he had been as a Democrat. Indeed, he became a friend of President Lincoln and Secretary Stanton, who consulted him about affairs in Indiana. He determined to resume a political career and in 1866 returned to Indiana with a seat in the United States Senate as his goal.

Senators were elected by the State legislature at the time, so Hughes determined first to become a member of the Indiana House of Representatives. He obtained the Republican nomination in Monroe County, which had historically been dominated by the Democratic Party. After a whirlwind campaign he was elected and served from 1866 to 1868. It was a wild campaign even by Indiana standards. Hughes spoke in every town and schoolhouse. He organized a campaign to appeal to the Union veterans. He had a glee club which he transported in a large well-decorated wagon drawn by four huge horses. They sang the popular war songs at his meetings. He also got a brass cannon, a six-pounder, a squad of artillerymen, old soldiers, and ammunition. His artillery preceded his invasion of a community, firing at intervals as the wagons approached, arousing much curiosity and producing a crowd. For half an hour prior to the speaking the gun would be fired, the glee club would sing "Rally Round the Flag, Boys," "Marching Through Georgia," "Just Before the Battle, Mother," and "John Brown's Body Lies a-Mouldering in the Grave," and other songs to which the veterans had marched. Then came the candidate's oration, abounding in wit, humor, and sarcasm. It was elegant, entertaining, and captivating. He won. In 1868 he

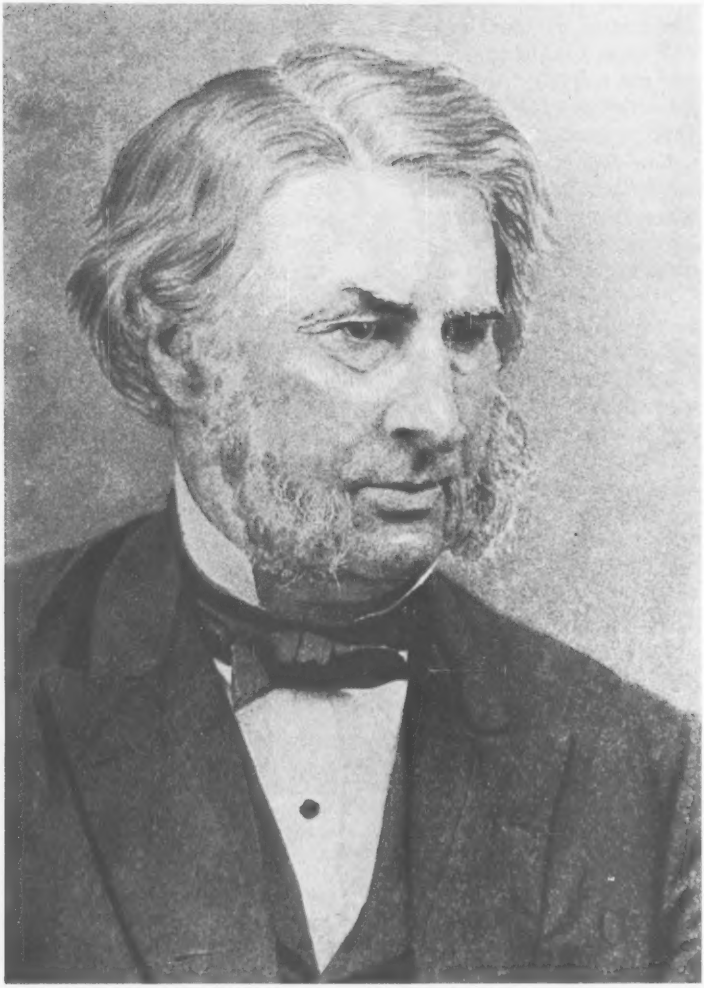
was elected to the Indiana Senate. The next year he sought election to the United States Senate but failed to secure the united support of his party and was unsuccessful in a close contest. He then resumed the practice of law in Washington, D.C., and, provoked at some Indiana Republican legislators who deserted him in his hour of need, reaffiliated with the Democratic Party, but took no further active part in politics.

In stature, Judge Hughes was about five feet, ten inches tall, fair, with blue eyes and a partially bald head. Dignity was personified in him. No one ever called him "Jim," slapped him on the shoulder, or took liberties with him. He dressed carefully and well. He was a born fighter, lacking in tact and diplomacy. This impeded his political advancement. Conciliation was not in his vocabulary. He was feared for his intellect and determination. He courted no man's friendship. But, he was not without friends. It is recorded that Judge Hughes "kept a fine stock of liquors and was so generous with political friends who visited him that some were overcome by his hospitality."

Judge Hughes' quiet, unremarkable service on the Court of Claims belies his flamboyant career in Indiana where he lived in constant fear of assassination and went about fully armed, engaging in frequent target practice and boasting of his bravery and proficiency with pistol and knife. One biographer has written: "The old wooden columns and the ceiling of the old courtroom bore the evidences of his inclination to shoot." He died just one month short of being 50 years of age, on October 21, 1873, at his residence near Bladensburg, Maryland, from a heart attack following a fall from a carriage. His body was returned to Bloomington, Indiana, and laid to rest in Rose Hill Cemetery near the scenes of his early turbulent career. Volume 5 of the JOURNAL of the Court of Claims, October 23, 1873, records a resolution in his honor by the Bar Association of the District of Columbia. The court adjourned in Judge Hughes' memory on that day.

References: U.S. COURT OF CLAIMS REPORTS, Vol. 17; WHO WAS WHO, Hist. Vol. (1607–1896); DICTIONARY OF AMERICAN BIOGRAPHY, Vol. IX (1932); 23 NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 157; BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS (1774–1971); Evening Star, Wash., D.C., Oct. 21, 1873; 5 Ind. Mag. of Hist. 85–98 (Sep. 1909); 5 Ct. Cl. JOURNAL 482–483 (Oct. 23, 1873); Bloomington Daily Herald-Telephone, Sesquicentennial ed., Sep. 24, 1968, § xii at 4; correspondence with Monroe Co. Pub. Library, Bloomington, Ind. (1976), and the Indianapolis-Marion Co. Pub. Library (1976); HESSELTINE, CIVIL WAR PRISONS at 241–244 (1930).

Photograph courtesy of Ind. State Hist. Soc'y Library, Indianapolis, Ind.



Joseph Casey

Joseph Casey

PENNSYLVANIA

6th Judge—1861–1863
1st Chief Justice—1863–1870

Joseph Casey was born in Ringgold Manor, Washington County, Maryland, on December 17, 1814. He was the son of Joseph Casey, Sr. (1771–1841), a native of Wicklow, Ireland, and a graduate of the Edinburgh University School of Medicine who emigrated to the United States in 1792, settling in Pennsylvania, where in 1804 he married Rebecca, daughter of Thomas McLaughlin of Franklin County. Mr. McLaughlin was of Scottish descent and served as a soldier in the American Revolution.

Joseph Casey was born when his father, a man of great learning in the ancient classics and literature, was engaged as a tutor in preparing the sons of Gen. Samuel Ringgold for college. Ringgold was a member of Congress and served in the War of 1812. Young Joseph was next to the youngest of nine children. His parents suffered economic misfortunes and were unable to keep the family together. Joseph, at only five years of age, was apprenticed in 1819 to a blacksmith named Henry McDermond of Newville, Pennsylvania, and continued there until his fourteenth year when he returned to his father's home which was then in Shippensburg, Pennsylvania. Up to this time he had attended school for only three months of his life. However, he was not illiterate for he was eager to learn and read all the books available to him. From the age of five years he attended Sunday School, mostly at the Big Spring Presbyterian Church, Newville, and so strong and tenacious was his memory that he memorized the greater part of the New Testament and most of the Psalms.

After leaving the blacksmith, he attended school for a year, which improved his English, but his father was still unable to be of much help to him, so in 1831 he became an apprentice to a hat manufacturer in Shippensburg. The following year he was an apprentice in the same business to Samuel Culbertson of Williamsport, Maryland. It was through the friendship of Mrs. Ambrose M. C. Cramer, wife of a merchant of that town, who recognized his potential, that he was able to procure books and was encouraged to pursue his reading and studies. However, he overdid it, undermining his health, and returned to Newville where, after a time, he engaged again in hatmaking, taught school, and continued his studies during the years 1834 and 1835.

He then entered the employ of William Heyser of Chambersburg as a clerk and assistant manager of his factory.

In 1836 Joseph Casey decided to study law and entered the law office of Charles B. Penrose of Carlisle, Pennsylvania, as a student and clerk. Mr. Penrose was the father of United States Senator Boise Penrose. Joseph taught school in Carlisle to help defray his expenses "while he devoted his leisure moments to the acquirement of legal knowledge." He was admitted to the bar at Carlisle in November 1838 and, encouraged by his prospects, married Mary A. Krettle of that city. They were the parents of three children who did not live to maturity. After two more years in Carlisle, Joseph Casey moved to Bloomfield to commence the practice of law. In 1845 he moved to New Berlin, Pennsylvania, a place he believed would offer better professional opportunities.

The future judge took an active part in public affairs and in 1848 was elected as a Whig to the 31st Congress where he served from March 3, 1849, to March 3, 1851. He declined renomination. In Congress he supported, in the main, the administrations of Presidents Taylor and Fillmore and voted for the measures of Clay's Compromise of 1850, except the Fugitive Slave Law. Upon the conclusion of his term in the House of Representatives, he accepted the nomination of the Whig Party for a judgeship in the district court for Mifflin and Union Counties, but due to a division in his party he was defeated.

In 1855 Joseph Casey opened a law office at Harrisburg where he prospered. At the solicitation of his friend, Governor Pollock, whom he had succeeded in Congress when Pollock became Governor, he accepted the appointment as a commissioner, under an act of the assembly, to investigate and settle the contest between the state and certain New York and Ohio railroad corporations, known as the Erie Railroad War. He brought this delicate and difficult undertaking to a successful conclusion. In 1856 the position of reporter of decisions of the Pennsylvania Supreme Court became vacant, and he accepted the appointment from Governor Pollock, reporting volumes 25 through 36 in the years 1856 to 1861. These Pennsylvania State Reports are cited as "Casey's Reports."

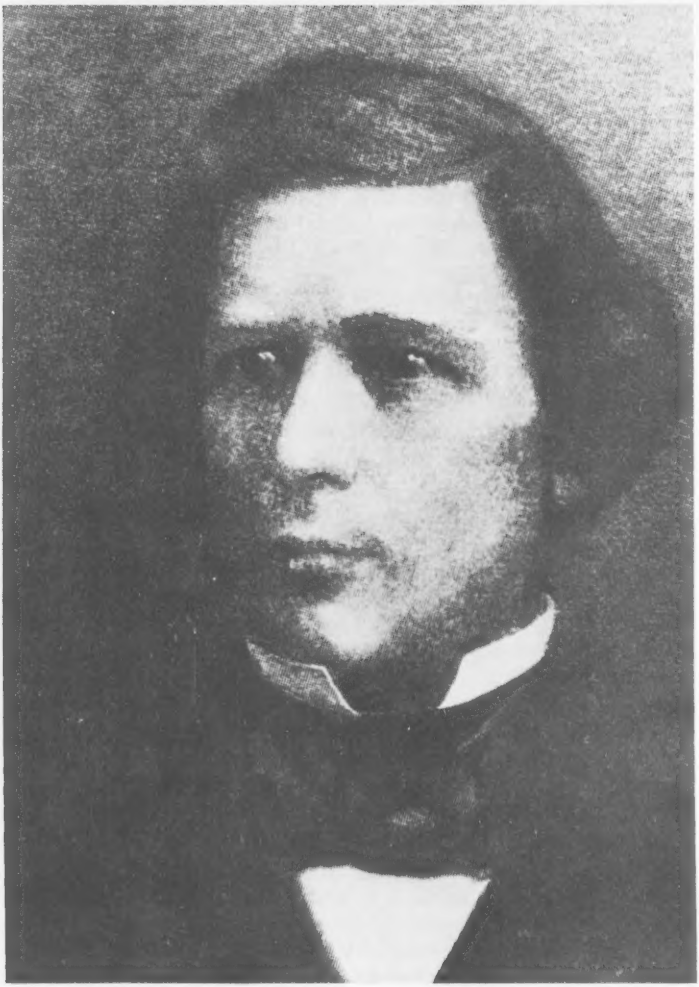
On May 23, 1861, President Abraham Lincoln commissioned Joseph Casey, now a Republican, as a judge of the United States Court of Claims, to succeed Judge George P. Scarburgh of Virginia, who in April of that year had given up his position to join the Confederacy. The Act of March 3, 1863, ch. 92, 12 Stat. 765, increased the number of judges on the court from three to five and, for the first time, authorized the President to designate one

of them as Chief Justice. President Lincoln commissioned Judge Casey to be the first Chief Justice of the Court of Claims on March 13, 1863, and he took the oath of that office on May 4, 1863. Judge Casey served a total of nine and one-half years on the court, including over seven years as Chief Justice. In failing health, he resigned the bench on December 1, 1870, and was succeeded by Charles Daniel Drake of Missouri. Thereafter, Judge Casey engaged in the practice of law in Washington, D.C., and taught law at the National University there. He died in Washington on February 10, 1879, and is buried in Oak Hill Cemetery in the District of Columbia. He had been a member and an elder of the New York Avenue Presbyterian Church in the Nation's Capital.

Chief Justice Casey served on, and led, the Court of Claims in its formative years when the judicial relations of the citizen and his Government were being defined. A contemporary biographer, in describing him, said:

> Freedom from prejudice, and fearlessness in the right, ever characterized his decisions and opinions. * * * He is free from all sectarian bigotry or bias, believing in the united efforts of all Christians for the elevation and regeneration of mankind.

References: U.S. COURT OF CLAIMS REPORTS, Vol. 17; DICTIONARY OF AMERICAN BIOGRAPHY, Vol. III (1929); BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS (1774–1971); WHO WAS WHO, Hist. Vol. (1607–1896); 7 NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 508; BIOGRAPHICAL ENCYCLOPEDIA OF PENNSYLVANIA OF THE 19TH CENTURY at 471 (1874); WEBSTER'S BIOGRAPHICAL DICTIONARY at 262; National Republican, Feb. 11–12, 1879.



David Wilmot

David Wilmot

PENNSYLVANIA

7th Judge—1863–1868

David Wilmot was born in Bethany, Pennsylvania, on January 20, 1814, the son of Randall and Mary (Grant) Wilmot (d. 1820), both of English descent. The first Wilmots came to New Haven, Connecticut, before 1641. Upon the death of young Wilmot's mother in 1820, a stepmother took her place. His father, a merchant, prospered and built a large pillared house, in the fashion of the period, where the family lived during David's boyhood. He attended school locally and in Aurora, New York, and received his legal education in the office of the Honorable William Jessup of Montrose and later under George W. Woodward of Wilkes-Barre. In 1834 he was admitted to the bar and settled in Towanda, Pennsylvania, to practice law. On November 28, 1836, he married Anne Morgan of Bethlehem, and they were the parents of three children.

One historical reference states:

> For ten years he continued law and politics with more and more politics and less and less law in the mixture. He was an ardent Jacksonian and an inveterate attendant of political gatherings. He was stout and of average height, rather slovenly in dress, enormous in appetite both in eating and drinking, forceful in speech, and lazy. It was much easier to make extempore political speeches than engage in the drudgery of the law. In 1844 he was active in promoting the endorsement of Van Buren by the Democratic state convention and later in the year was elected to Congress from one of the strongest Democratic districts.

Wilmot served as a Democratic member of the 29th, 30th, and 31st Congresses from March 4, 1845, to March 3, 1851. He was only 30 years of age when he was first elected. The war with Mexico (1846–1848) took place during the Polk administration and started during Wilmot's first term in the House. He did not agree with the position of President Polk that the Federal Government had no authority to prevent the spread of slavery into new territories. When an appropriation bill to pay Mexico for California, Utah, Nevada, and parts of Arizona and New Mexico came before the House, Wilmot offered an amendment on August 8, 1846, which would make the extension of slavery into those

areas illegal. Known as the "Wilmot Proviso," the amendment passed the House but failed in the Senate. However, it made the young, new congressman famous nationally at the age of 32, but unpopular with his constituents and the Buchanan wing of the Democratic Party in his state. In the interest of harmony he did not stand for renomination in 1850, and his law partner, Galusha A. Grow, was elected. Grow served three terms as a Democrat but developed the same antislavery views as Wilmot. Switching parties, Grow was elected as a Republican to several terms and was Speaker of the House in the 37th Congress.

Meanwhile, Wilmot became active in the Free-Soil Party, forerunner of the Republican Party. He took a leading part in the formation of the Republican Party in 1854. From 1851 to 1861 he was the presiding judge of the 13th Pennsylvania Judicial District. He was a delegate to the first GOP National Convention in 1856, held in Philadelphia, and was the author of its first platform. He was mentioned as a possible nominee for Vice President. In 1857 he was the first Republican nominee for Governor of his state, but was defeated. He was a delegate to, and temporary chairman of, the 1860 Republican National Convention in Chicago where he supported the nomination of Abraham Lincoln against Simon Cameron, his own senator. In 1861 he was a member of the "Peace Congress" held in Washington in a futile effort to devise a means to prevent the impending war.

After the election, President Lincoln offered Wilmot a Cabinet post but he declined it, preferring the Senate instead. He was elected to succeed Senator Simon Cameron who had resigned to become Lincoln's first Secretary of War. Wilmot served in the Senate from March 14, 1861, to March 3, 1863. He was a faithful supporter of President Lincoln in the Senate, but the Democratic State legislature denied him reelection. He did, however, have the satisfaction of seeing the concept of the Wilmot Proviso become law on June 19, 1862.

Immediately upon the expiration of Wilmot's term, President Abraham Lincoln commissioned him a judge of the Court of Claims on March 7, 1863, where he served for five years until his death on March 16, 1868, in Towanda, Pennsylvania, at the age of 54. He was appointed pursuant to the Act of March 3, 1863, ch. 92, 12 Stat. 765, which enlarged the membership of the Court of Claims from three to five members. Upon his death he was succeeded by Samuel Milligan of Tennessee. It is interesting to note that Wilmot, while in the Senate, voted against creation of the judgeship to which he was appointed four days after the President signed the bill into law.

When appointed to the Court of Claims, the health of Judge Wilmot had begun to fail. Some writers have said that "his service was neither continuous nor effective." However, the JOURNAL of the court, volume 4, shows that Chief Justice Casey and Judges Loring, Peck, and Nott received a resolution on March 20, 1868, from the District of Columbia Bar Association praising his service on the court. Chief Justice Casey replied in eloquent terms commending Judge Wilmot for his outstanding contribution to the court in specific cases, as follows: "Written as they were under the depressive influences of physical prostration and suffering, they are notwithstanding models of judicial composition and stamp this author as a man of no ordinary capacity and power. * * * [T]heir concise and distinct statement of premises, the force and power of their logic and their natural and almost irresistible conclusions entitle our departed brother to rank among the most gifted [judges] the Country has produced." He spoke also of his personal qualities of cogent logic, unassuming and gentle manner, love of justice, and earnest sympathies for all men. The New York Times attributed Judge Wilmot's death to "severe nervous prostration."

Judge Wilmot was survived by his wife and one of their three children. Interment was in Riverside Cemetery, Towanda, Pennsylvania.

References: U.S. COURT OF CLAIMS REPORTS, Vols. 3, 17; 4 Ct. Cl. JOURNAL at 3–6 (Mar. 20, 1868); DICTIONARY OF AMERICAN BIOGRAPHY, Vol. XX (1936); BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS (1774–1971); WHO WAS WHO, Hist. Vol. (1607–1896); 3 NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 419 (also, Vol. 2 at 91 and Vol. 13 at 152); 6 APPLETON'S CYCLOPEDIA OF AMERICAN BIOGRAPHY 544; TWENTIETH CENTURY BIOGRAPHICAL DICTIONARY OF NOTABLE AMERICANS, Vol. X; DICTIONARY OF AMERICAN PORTRAITS at 677; WEBSTER'S BIOGRAPHICAL DICTIONARY at 1582; N.Y. Times, Mar. 20, 1868, at 2, col. 2; G. B. Going, *David Wilmot, Free-Soiler* (1924); C. E. Persinger, *The "Bargain of 1844" as the Origin of the Wilmot Proviso*, Annual Rept. of the Am. Hist. Ass'n, Vol. I (1913).

Ebenezer Peck

Ebenezer Peck

ILLINOIS

8th Judge—1863–1878

Ebenezer Peck was born in Portland, Maine, on May 22, 1805. He lived for a time in Peacham, Vermont, where he received some elementary education but while still a child his parents moved to Canada. He was educated in law at Montreal, was admitted to the bar there in 1827, and in 1833 became King's Counsel for Canada East, now Quebec. He was twice elected to the Provincial Parliament on the Reform ticket. In 1826 he was married to Caroline I. Walker at Peacham, Vermont.

In the summer of 1835, Peck moved to Chicago, after having visited St. Louis and rejecting it as a place of residence because of its tolerance of slavery. He moved to Chicago two years before the city was organized under a charter of city government. It was a frontier village under the shelter of Fort Dearborn. There, the youthful lawyer and politician immediately became prominent. He was a delegate to the first Democratic State Convention in Illinois, held in Vandalia on December 7, 1835, and was a delegate to the Illinois Constitutional Convention in 1869–1870. He was the chief advocate for the general adoption of the convention system, which was also being urged by Gen. Andrew Jackson upon his loyal followers. Peck had become acquainted with the system in Canada and was of the view that conventions, rather than popular primaries, were an "absolute necessity to prevent the disorganization of parties through the restless vanity of obscure and insubordinate aspirants." His advocacy of the system was opposed by the Whigs, who were led by Stephen A. Douglas. Peck was looked upon by his political opponents with distrust and suspicion, having come from Canada, where as a member of the Parliament he was imagined to be "permeated with secret hostility to republican institutions." Whigs denounced his views of the convention system as subversive, but with the rise of strong party organizations they were required to adopt the system themselves "or be left alone with their virtue." Peck promoted his views through a Democratic paper, The Argus, which he published and edited for a time. The paper was subsequently merged with the Chicago Press, later the Press and Tribune.

The organization of political parties in Illinois dates from the time and influence of Ebenezer Peck who, through party prefer-

ence, became an internal improvement commissioner in 1837, w
a member of the Illinois State Senate from 1838 to 1840, and a
member of the Illinois State House of Representatives from 1840
to 1842. He was the clerk of the State Supreme Court from 1842 to 1848, and the reporter of decisions for that court from 1849 to 1863. He reported volumes 11–22, 24, and 26–30. However, his antislavery sentiments led him to abandon the Democratic Party in 1853, and in 1856 he helped to establish the Republican Party in Illinois. He was again elected to the State House of Representatives from 1858 to 1860. Peck, the alleged "Canadian agent of tyranny and oppression," became a close personal friend of Abraham Lincoln in the political strife in Illinois and in the struggle to abolish slavery.

On March 10, 1863, President Lincoln commissioned Ebenezer Peck as one of the two additional judges authorized by the Amended Court of Claims Act, ch. 92, 12 Stat. 765 (1863). He delivered the first case decided after the reorganization of the court—*Gordon's Case*, 1 Ct. Cl. 1 (1863). This case was reviewed by the Supreme Court, 69 U.S. (2 Wall.) 561 (1864). The opinion there was first written by Chief Justice Taney who died before it had been finally approved by the Supreme Court. The clerk then submitted it to the Justices, who agreed it should be the basis of a Court opinion. It was then misplaced, but an opinion was announced by Chief Justice Chase. It is reproduced at 7 Ct. Cl. 1 (1871). The Taney opinion, with later approval of the Court, finally appeared at 117 U.S. 697 (1884). Out of this confusion came the Act of March 17, 1866, ch. 19, 14 Stat. 9, which repealed an inadvertent provision of the Act of March 3, 1863, that no judgment of the Court of Claims could be paid out of the Treasury until after an appropriation therefor had been estimated by the Secretary of the Treasury. The Supreme Court held in *Gordon's Case* that this kept the court's decisions from being final and thus reviewable by the Supreme Court.

Hardly had Judge Peck taken his seat on the Court of Claims when he was afflicted with great physical suffering caused by a disease of the knee joint, and was confined to bed. Several months later he was able to resume his duties intermittently but, after nearly 15 years of judicial service and having reached 73 years of age, he retired, effective May 1, 1878, and returned to Chicago. The last time Judge Peck sat on the bench was February 14, 1878. He was succeeded by William H. Hunt of Louisiana. Judge Peck died in Chicago on May 25, 1881, at 76 years of age. The New York Times reported his death on that date as follows:

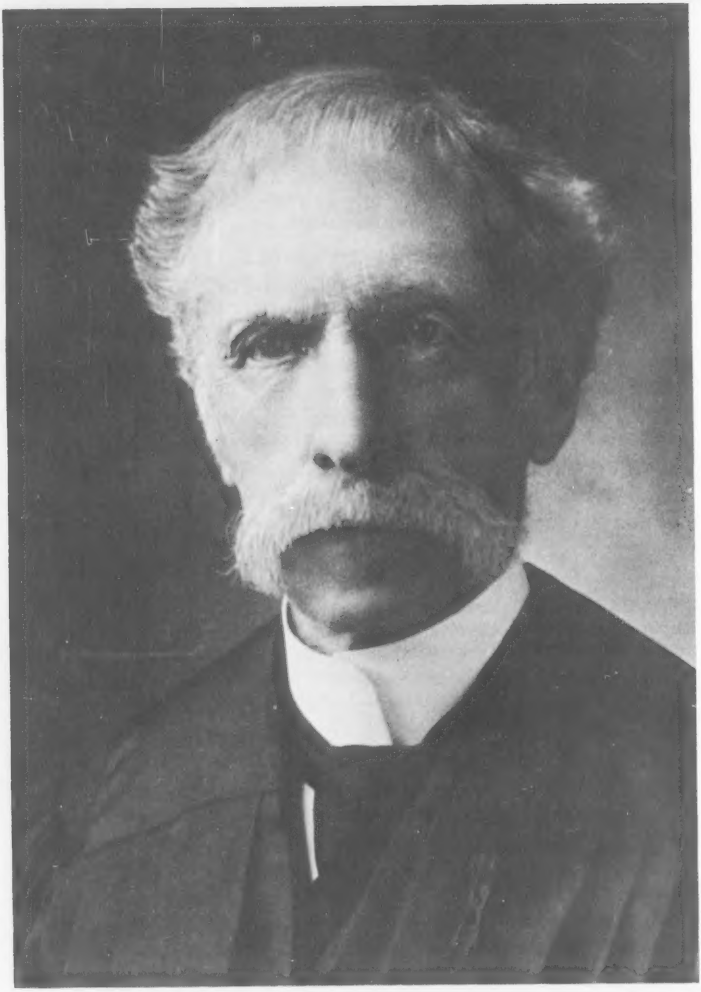
AN OLD FRIEND OF LINCOLN DEAD

Chicago, May 25. Judge Ebenezer Peck for many years

> the most intimate friend of Abraham Lincoln, died in this city today at the age of 76 years. Judge Peck was at one time a member of the Legislature of Lower Canada and was a King's Counsel at the Canadian bar. He came to the United States about 1840 and was Democratic in politics until the Lincoln-Douglas contest. Judge Lyman Trumbull stated tonight that no man ever possessed the confidence of Abraham Lincoln to the extent that Judge Peck did, that their intimate relations continued after Lincoln's election to the Presidency, and that Lincoln showed his high esteem for Judge Peck by appointing him Judge of the Court of Claims, an office which he held for several years.

Mrs. Peck had died in 1877. A son, Charles F. Peck, and two daughters, Mrs. Edward Wright and Mrs. Perry Trumbull, survived him. His eldest son, Capt. W. W. Peck, U. S. Army, died in Washington, D.C., in 1862, at the age of 31 years. Judge Peck's funeral was at his residence, 15 Walton Place, Chicago, Illinois, and he is buried in Rosehill Cemetery. His death brought many public tributes to his life and character which appeared in the Chicago Tribune and in other Illinois newspapers. The Bar Association of Chicago held a special meeting on May 26, 1881, and adopted resolutions which were presented to the federal circuit court and to the Illinois Supreme Court. Many distinguished judges and lawyers spoke at the meeting. Their tributes are preserved in the bound *Memorial of Judge Ebenezer Peck* in the Library of Congress.

References: U.S. COURT OF CLAIMS REPORTS, Vols. 13, 17; N.Y. Times, May 26, 1881, at 5, col. 4; 6 MCCLURE'S MAG. 310 (1895–1896); 33 CENTURY MAG. 269 (1886–1887); *Memorial of Judge Ebenezer Peck* (reported by Edward R. Magie); HISTORIC ENCYCLOPEDIA OF ILLINOIS, Cook Co. ed., Vol. I (1905); COLLECTED WORKS OF ABRAHAM LINCOLN, Abraham Lincoln Ass'n Hist. Book Club ed., Rutger's (1953); correspondence with Reporter of Decisions, Supreme Court of Ill. (1976); Maurice G. Porter, Clinton, Ill. (1976); and Ill. State Hist. Library, Springfield, Ill. (1976).



Charles Cooper Nott

Charles Cooper Nott

NEW YORK

9th Judge—1865–1896
4th Chief Justice—1896–1905

Charles Cooper Nott was born at Schenectady, New York, on September 16, 1827, the son of Joel Benedict and Margaret Taylor (Cooper) Nott. His father was a professor of chemistry at Union College, Schenectady, and his grandfather, Dr. Eliphalet Nott, was president of that college from 1804 to 1866. The family was established in America by an Englishman, John Nott, who came to Wethersfield, Connecticut, about 1640. The family became prominent and Judge Nott's great-uncle, Abraham Nott, was Chief Justice of the South Carolina Supreme Court.

Charles Cooper Nott married Alice Effingham Hopkins on October 22, 1867, at Williamstown, Massachusetts. She was the daughter of Mark Hopkins, president of Williams College, Williamstown, Massachusetts. The Notts had two children: Marjorie, wife of the famous New York lawyer, Victor Morawetz, and Charles Cooper Nott, Jr., who became a judge of the Court of General Sessions, New York City.

After receiving his A.B. degree from Union College in 1848, Charles C. Nott studied law in Albany under John V. L. Pruyn, was admitted to the New York bar in 1850, and began to practice his profession in New York City in 1851. He received the honorary degree of LL.D. from Williams College in 1874, and was a trustee of Union College from 1868 to 1882. For eight years he was a trustee of the New York City public schools, was a notary public, loan commissioner, and one of the commissioners appointed by the Governor to revise the city school system, and was the unsuccessful Republican candidate for judge of the Court of Common Pleas in 1858. He was one of the committee of citizens who invited Abraham Lincoln to New York to deliver what became Lincoln's historic Cooper Union Address, a speech that gave the future President favorable attention in the Eastern States and helped to create sentiment in his favor for the presidency. A friendship began between the two men at that time. Nott recorded the address in shorthand, at which he was proficient, and published it with annotations in 1860.

With the outbreak of the Civil War, Nott, then 34 years of age, obtained an appointment from Gen. John C. Fremont as a captain in the Fremont Hussars, Union Army. He later served in the

5th Iowa Cavalry, as a lieutenant colonel in the 131st New York Volunteers, and as colonel of the 176th New York Regiment. In June 1863, while in a military hospital in Brashear City, Texas, he was captured and remained a Confederate prisoner in Texas until July 1864, seeing no further active service. He emerged from prison with seriously impaired health and returned to practice law in New York City.

Upon the recovery of his health, President Abraham Lincoln commissioned him, at 37 years of age, an associate judge of the U. S. Court of Claims on February 22, 1865, to succeed Judge James Hughes of Indiana, who had retired. This appointment was one of the President's last since he was assassinated on April 14, 1865. Judge Nott served 31 years in this capacity until December 15, 1896, when he was named Chief Justice of the court by President Grover Cleveland to succeed the late Chief Justice, William A. Richardson. The vacancy of associate judge created by Judge Nott's elevation to Chief Justice was filled by the appointment of Charles B. Howry of Mississippi. Chief Justice Nott took his oath of office on February 8, 1897, and served in that capacity until his retirement on December 31, 1905, a total judicial service of 40 years, 10 months, and 9 days—the record for length of service on the court. Chief Justice Nott was succeeded as Chief Justice by his colleague, Judge Stanton J. Peelle of Indiana.

In the last years of his life, Judge Nott lived at Princeton and Morristown, New Jersey. Mrs. Nott died on April 4, 1915, while they were living in Morristown. Judge Nott's death occurred at the home of his son in New York City on March 6, 1916, at 88 years of age.

When Judge Nott took office at the Court of Claims in 1865, the court had only been in existence for 10 years. In this critical, formative period of the court's history, Judge Nott's long tenure left an indelible stamp upon it as an institution. His opinions are spread through the first 40 volumes of the bound official REPORTS of the court.

No small part of his service to the court was in his reporting of its decisions. From 1867, when publication of regular REPORTS began, until 1914, he served as reporter, except for the 1882–1883 term when he was ill. It will be seen, therefore, that nine of those years were subsequent to his retirement as Chief Justice, and his work continued until two years before his death. From 1867 to 1872 he was aided in this work by his friend, Samuel H. Huntington, the then chief clerk of the court, and thereafter, until 1914, Judge Nott and Col. Archibald Hopkins, his brother-in-law and chief clerk of the court from 1873 to 1914, reported the cases together.

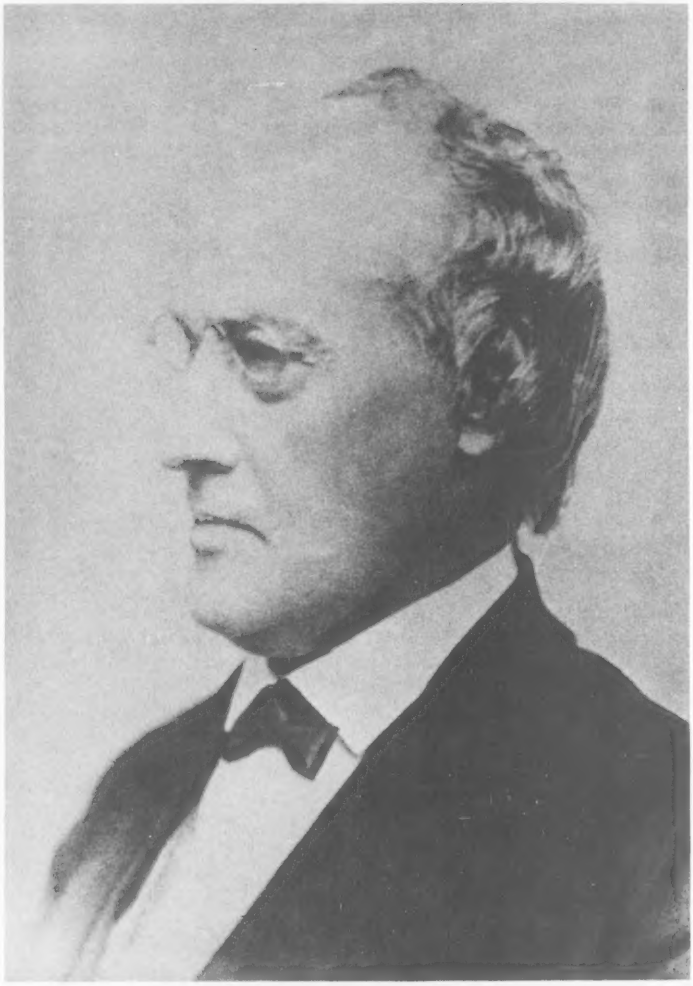
During his active years Judge Nott was a voluminous contributor to the press and other publications. Much of his writing was done anonymously in the form of editorials and reviews. His longer works include *A Treatise on the Mechanics' Lien Laws of the State of New York* (1856), *Sketches in Prison Camps* (1865), *The Seven Great Hymns of the Medieval Church* (1865), *The Mystery of the Pinckney Draught* (*Draft*) (1908), and *The Authority of the President To Approve Bills After the Adjournment of Congress and History of the Veto Power* (1894). He was a man of great energy, industry, definite convictions, and strong interests. He liked the out-of-doors and was fond of horseback riding. He was an Episcopalian.

Chief Justice Nott's portrait, a gift of his daughter, hangs in the courthouse. An earlier portrait, which was destroyed by fire in 1930, had been a gift to the court by members of its bar in a ceremony on April 9, 1906, presided over by Chief Justice Stanton J. Peelle. The remarks on that occasion illustrate vividly the high regard in which Judge Nott was held as a man, and judge, by his colleagues, the bar, the court staff, and other friends. He was a gentle and scholarly man who was devoted to the court, the legal profession, and his country. His service was remarkable for its length and quality.

In an address to the Columbia Historical Society in Washington, D.C., on January 19, 1915, Chief Justice Peelle said of his predecessor: "I think I express the sense of the bar when I say that he did more to give character to the Court than any other judge." His statement was correct, at least when it was made. He was doubtless thinking of the long tenure and many fine opinions written by Chief Justice Nott. It is less certain whether he was thinking of Nott's opinion in *Mrs. Lockwood's Case*, 9 Ct. Cl. 346 (1874). It was Judge Nott's misfortune to have been assigned to write this opinion for a unanimous court. Mrs. Lockwood, wife of a federal judge, had gone to law school and was admitted to the District of Columbia bar. She was not so fortunate when she applied for admission to the Court of Claims bar. The then Rule 13 of the court spoke only in terms of admission of "a man of good moral character." In a scholarly review of the common law, Judge Nott concluded that the court was without jurisdiction to admit the applicant and "that a woman is without legal capacity to take the office of attorney." However, he invited Supreme Court review. Mrs. Lockwood failed before that Court also but she was not so easily put off. This early day feminist took her problem to Congress which finally, in 1879, legislated in her favor. Belva Ann Lockwood ran for President as the candidate of the National Equal Rights Party in 1884 and 1888, but Grover Cleveland and

Benjamin Harrison prevailed in those years. Her portrait hangs in the National Portrait Gallery in Washington, D.C. She was a lady who was ahead of her time, but her valiant efforts helped to shape the future she saw more clearly than Judge Nott whose views accurately reflected the state of the law as it existed and was then understood.

References: U.S. COURT OF CLAIMS REPORTS, Vols. 17, 41, 51; WHO WAS WHO, Vol. I (1897–1942); TWENTIETH CENTURY BIOGRAPHICAL DICTIONARY OF NOTABLE AMERICANS, Vol. VIII; DICTIONARY OF AMERICAN BIOGRAPHY, Vol. XIII (1934); 28 NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 10; S. J. Peelle, *History and Jurisdiction of the U.S. Court of Claims*, Records of Colum. Hist. Soc'y, Vol. 19 (1916); N.Y. Times, Mar. 7, 1916, at 11; N.Y. Herald, Mar. 7, 1916; Sunday Star, Wash., D.C., Mar. 5, 1972, at F–10.



Samuel Milligan

Samuel Milligan

TENNESSEE

10th Judge—1868–1874

Samuel (Sam) Milligan was born in Greene County, Tennessee, on November 16, 1814, the son of Samuel (d. 1843) and Catherine (Reynolds) Milligan (d. 1837). He was the grandson of John Milligan, an immigrant from County Antrim, Ireland, who came to Pennsylvania and then moved to Virginia. This pioneer family, later living in Tennessee, was poor in worldly goods and was described as living "in narrow circumstances." One sketch of the life of the future judge remarks that he encountered all the obstacles of "chill penury" but that they were incapable of repressing his "noble rage" for an education. He attended rural schools and at the age of 16 he became a rural schoolteacher. Eventually his ambition and energy led him to Greeneville College where he began his studies, specializing in Latin, Greek, and higher mathematics. The school failed and he entered Tusculum College. His grandson, S. J. Milligan of Greeneville, a special justice of the Supreme Court of Tennessee in 1961, was a trustee of Tusculum College from 1933 to 1951.

While still a college student, Samuel Milligan was elected to the State legislature in 1841 and was reelected in 1843 and 1845. His service in the legislature delayed his graduation from Tusculum College until 1843, when he was 29 years of age. In 1851 his alma mater conferred upon him the degree of master of arts.

Samuel Milligan studied law in the office of Justice Robert J. McKinney who served on the Tennessee Supreme Court. He was admitted to the Tennessee bar in 1846 and commenced the practice of law in Greeneville. Soon thereafter, however, he suffered the loss of the sight of his right eye due to an illness. From his childhood he had not been strong physically, but this did not prevent him from being commissioned by President Polk in 1847 as a major in the Army Quartermaster Corps for service in the war with Mexico. His long journey to join the forces of Gen. Winfield Scott in Mexico took him to Nashville where he floated down the Cumberland River to the Ohio River. There he changed boats and proceeded on the Ohio and Mississippi Rivers to St. Louis where he changed vessels again and embarked for New Orleans. Joining a military wagon train and troops, he proceeded to Mexico

and saw action at Vera Cruz, Jalapa, and Mexico City. When the war was over he made his way back to Washington, D.C., reported to his superiors, and was discharged.

Upon his return to Greeneville, Judge Milligan renewed the practice of his profession and established a newspaper named the Greeneville Spy. The paper was the political spokesman for the Democrats of East Tennessee.

On February 22, 1849, Samuel Milligan married Elizabeth Ruston Howard (1816–1900) of Greeneville. She was a descendant of the Howards who first came to Maryland in the 17th century with one of the Lords Baltimore. The Howards were prominent in the early life of Baltimore City and in the state, and the family name remains prominent there.

In 1857 Milligan was an unsuccessful candidate for Congress. He was appointed the following year by the Governor as one of the commissioners to rerun the boundary line between the States of Virginia and Tennessee to settle a long-standing dispute about its proper location. In 1860 he received a short-term appointment to the Tennessee Supreme Court, and the following year he was appointed by the legislature as a delegate from his state to the well-meant but ineffective "Peace Congress" in Washington, D.C., which made a last-minute, futile effort to find a way to avoid the Civil War.

Although a Democrat in his early career and a delegate to the Democratic National Convention in 1860, Samuel Milligan was an unflinching Unionist and was opposed to secession. After the Civil War started he was compelled to endure many hardships in his native state because of these views. In 1864 Confederates forced him to leave home and live in Nashville where he remained until the surrender of General Lee. The Milligan family, like many others in border states, was divided in its loyalties during this tragic period of history.

Samuel Milligan received an appointment by President Lincoln to be an associate justice of the Supreme Court for the Territory of Nebraska but declined the position. He did accept the appointment in 1864 by Andrew Johnson, Military Governor of Tennessee, to be a justice of the Tennesse Supreme Court. In 1865 he took an active part as a member of the Tennessee Constitutional Convention in Nashville. Milligan resigned from the Tennessee Supreme Court in 1867 but on March 21, 1867, was reappointed by Governor Brownlow. He served on that court until he was commissioned by President Andrew Johnson on July 25, 1868, to be an associate judge of the U.S. Court of Claims. Milligan had not solicited this appointment, and had previously rejected President Johnson's offer, by telegram, giving him a choice of appointments

as Solicitor of the Treasury, Consul to Cuba, or Minister to Bolivia. This telegram remains in the possession of Judge Milligan's grandson in Greeneville. Judicial work, however, was more appealing to him, and he assumed his duties as a judge of the Court of Claims upon taking his oath of office on September 23, 1868, succeeding Judge David Wilmot of Pennsylvania, deceased. Judge Milligan served on the court until his death in office on April 20, 1874, at only 59 years of age. He was, in turn, succeeded by William A. Richardson of Massachusetts, who later became Chief Justice of the court. Judge Milligan is buried in Oak Grove Cemetery, Greeneville, Tennessee.

A fellow lawyer, collegemate, and lifelong friend, Oliver P. Temple, has written in some detail about Judge Milligan. He observes that Judge Milligan and President Andrew Johnson were both from Greeneville, that they were warm, personal friends and political associates, and had both served in the legislature. He says that Milligan was Johnson's most intimate friend and adviser for 25 years. Andrew Johnson had come to Greeneville in 1826 at 18 years of age, poverty-stricken and illiterate. Johnson was self-educated, and never went to school a day in his life. He was six years older than Milligan but they became close friends. They were entirely different in temperament but Johnson trusted Milligan and admired his formal learning. Milligan encouraged Johnson to acquire learning, admired his political leadership, and was a devoted supporter. Johnson became a city alderman, mayor, served in both houses of the State legislature, became Governor, served in both houses of the U.S. Congress, was elected Vice President with Abraham Lincoln, and became President upon Lincoln's assassination in 1865. He never overlooked an opportunity to recognize and reward Samuel Milligan, whose public service, like his personal advice and help to the President, was marked by the highest standards.

As a practicing lawyer, Judge Milligan was careful in his preparation and clear in his argument. As a judge he was eminently just and impartial. He was a classical scholar. In demeanor he was grave, sedate, and retiring. "His modesty and humility were so excessive that he seemed to be always shrinking from observation." Mr. Temple continues:

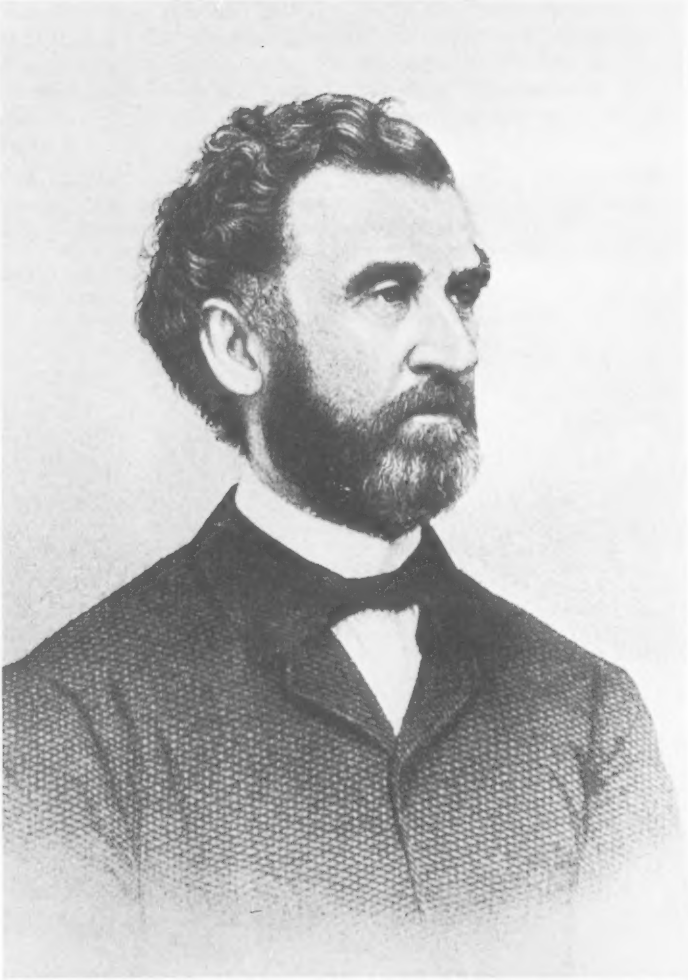
> Sam Milligan's life was one long round of modesty, humility, gentleness, and peacefulness. He uttered no harsh words, gave no wounds, was guilty of no questionable acts. His conduct in all things was upright and noble. He absolutely had no enemies. He came out of all his political contests, however heated, with the good will, the esteem, and admiration even,

of his political opponents. He was just and honorable in all things.

On April 20, 1874, the representatives of the Court of Claims bar presented to the court an appropriate resolution concerning the recently deceased judge, commending him for "excellence of his character, as a man of fidelity and ability." The Honorable Joseph Casey, retired Chief Justice of the court, spoke in high praise of his former colleague, and the incumbent Chief Justice, Charles Daniel Drake, spoke for the court, expressing its appreciation of the high judicial abilities and fine character of the departed judge who preferred to be known simply as "Sam" Milligan.

References: U.S. COURT OF CLAIMS REPORTS, Vols. 9, 17; 6 Ct. Cl. JOURNAL 120–123 (Apr. 20, 1874); 5 NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 193; J. T. MOORE, TENNESSEE, THE VOLUNTEER STATE, 1769–1923, Vol. II at 192 (1923); O. P. TEMPLE, NOTABLE MEN OF TENNESSEE FROM 1833 TO 1875 at 152–158 (1912); N.Y. Times, Apr. 21, 1874, at 1, col. 4.

Photograph courtesy of Judge S. J. Milligan, Greeneville, Tenn., grandson, as well as valuable information through correspondence (1976).



Charles Daniel Drake

Charles Daniel Drake

MISSOURI

11th Judge
2d Chief Justice—1870–1885

Charles Daniel Drake was born in Cincinnati, Ohio, on April 11, 1811, the son of Dr. Daniel (1785–1852) and Harriet (Sisson) Drake. He attended St. Joseph's College, Bardstown, Kentucky, in 1823–1824, and Partridge's Military Academy, Middletown, Connecticut, in 1824–1825. He then joined the Navy as a midshipman at the age of 16 but resigned in 1830 after three years because of his decision to study law rather than follow the sea. Drake was admitted to the bar in Cincinnati in 1833, after private study, and in 1834 moved to St. Louis to practice. He was not rewarded with initial success in St. Louis and returned to his Ohio home in 1847 to practice law. In 1849 he spent the year in New York City as treasurer of the Board of Foreign Missions of the Presbyterian Church, with which he was closely connected throughout his life. He then returned to St. Louis in 1850. When he was first in that city he founded the St. Louis Law Library in 1838 and managed it for eight years. He resumed managing it in 1850 for another 13 years and has been quoted as saying that he wished to be remembered for this achievement above all others.

In 1859–1860 Drake was elected and served as a Democratic member of the Missouri State House of Representatives. In the critical campaign of 1860 he supported Douglas over Lincoln for President and also supported the proslavery candidate for Governor. He opposed secession, however, and became a leader in Missouri in the attack on slavery as an institution and strongly favored preservation of the Union. He energetically organized and led the radical, or so-called "charcoal," wing of the Unionist Party. In 1864 he was a Republican presidential elector for the ticket of Lincoln and Johnson.

Drake was elected as a member of the State Constitutional Convention in 1865 and was chosen by the delegates as its vice president. By every account, Drake was the most active and prominent member at this convention, and the directing force in the formation of the new State constitution which abolished slavery in Missouri and incorporated some of the harsher theories of reconstruction that were believed necessary to secure the results of the Civil War. His dedicated political opponent in the Missouri Republican Party was the German-born liberal reformer, Carl

Schurz, who at the time was the editor of a German-language newspaper in St. Louis, and a former major general in the Union Army. He was later to gain fame as Minister to Spain, United States senator, Secretary of the Interior, writer, and publisher. Schurz said of Drake: "* * * in politics he was inexorable. * * * [M]ost of the members of his party, especially in the country districts, stood much in awe of him." III *Reminiscences* at 294 (1908). The constitution was adopted by vote of the people in June 1865 and became known as the Drake constitution. Under it the radical Republicans maintained absolute political control of the state for a few years with Drake as their acknowledged leader. In 1866 part of the Drake constitution was declared unconstitutional as a violation of the *ex post facto* and bill of attainder clauses. *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277 (1866).

Although never personally popular, in 1867 Drake was elected to a six-year term in the United States Senate by the State legislature, in recognition of his leadership. He assumed his Senate seat on March 4, 1867. There he favored impeachment of President Andrew Johnson and severe reconstruction measures. In the meantime, Drake's political tide had begun to recede in Missouri. Senator John B. Henderson of Missouri had voted against the impeachment of Andrew Johnson to the great displeasure of his colleague, Drake, who had handpicked a former Union general as Henderson's successor. But, things did not go well before the legislature. Schurz, the Republican Reform candidate, challenged Drake to a series of two debates before the legislators. The dogmatic positions of the senator, who was acknowledged by his opponent as absolutely incorruptible personally, were no longer in tune with the prevailing political sentiments of his party in Missouri. A man small in physical stature, slow in speech, and with a rasping voice, he was no match in debate with the elegant, intellectual Schurz, who was unanimously elected and took his seat in the Senate on March 4, 1869. Drake returned to Washington, fully realizing the significance of his defeat.

In 1870 the Democrats carried the state and abolished the civil disabilities Drake and his followers had written into the constitution. Although his term in the Senate would not have expired until 1874, he resigned his seat, having been commissioned by President Ulysses S. Grant on December 12, 1870, as the second Chief Justice of the U.S. Court of Claims to succeed Chief Justice Joseph Casey who had resigned. He took his judicial oath of office on December 19. He is one of three chief justices appointed who had not first served as an associate judge. Francis P. Blair, a Democrat who had been a colonel on Gen. William T. Sherman's staff in the Union Army, was elected to fill the Senate vacancy. Chief Justice

Drake served on the court until January 12, 1885, when he resigned and was succeeded by Judge William A. Richardson. He then practiced law in Washington, D.C., where he died on April 1, 1892, a few days short of being 81 years old. His wife, Margaret E. Drake, and his daughter, Mrs. Anna P. Westcott, survived him. The Chief Justice is buried in Bellefontaine Cemetery, St. Louis, Missouri.

Judge Drake received an honorary LL.D. degree in 1863 from Hanover College, Indiana, and from the University of Wooster, Ohio, in 1875. In 1854 he published A TREATISE ON THE LAW OF SUITS BY ATTACHMENT, which had seven editions, and also published a volume of his antislavery speeches in 1864. The political career of Judge Drake mirrored the confused and chaotic conditions of his time. He appeared successively as a Whig, a Know-Nothing, a Democrat, a Unionist, and finally as a Republican. When he became Chief Justice of the court, he mellowed in his more extreme views and performed effectively as a judge. He wrote many opinions in a clear, forceful style, going "straight to the point without wasting much time to get there."

His peers and biographers all described Chief Justice Drake as a stern, dictatorial, formidable personality, and "not the most amiable of men." He was "grim of visage and peremptory of tone." At the presentation of his portrait to the court by his daughter on December 7, 1908, the speakers variously remarked on these characteristics. One commented that his early military experience gave him a certain martial spirit which he demonstrated in administering the affairs of the court. "He had the habit of issuing orders as chief justice in a tone and temper that savored of the quarterdeck." He was said to be "scarcely tolerant of dissent." A colleague observed that he was forcible in announcing his views, "a trait that proved of value in the deliberations of the court." Another said: "He maintained the dignity of the bench, even in trifling matters. The virility of his expressions added appreciably to the reputation of the court." At the same time there was agreement by all who knew him that the striking feature of his character was an uncompromising devotion to right and justice, that while brusque he was never malicious, and that he repeatedly demonstrated "a kindly heart lay beneath a stern Cromwellian-Calvinistic exterior." It sometimes took a while for this to be appreciated. Judge Drake's first encounter with President Lincoln was early in the Civil War when Drake headed a delegation of 70 Missouri citizens who came to Washington to tell the President how to run the war, beginning with the firing of General Schofield. The President patiently listened to Drake present their case "in a tone that was peculiar to him" and then they

quickly found themselves on the sidewalk facing a long trip home with no results to show for their efforts.

On February 25, 1885, the Court of Claims bar adopted a complimentary resolution commending his 14 years of service as Chief Justice of the court. The retired Chief Justice made a graceful response, which is recorded in volume 20 of the REPORTS. Such an intense personality naturally generates many stories which are frequently embellished with time. We will not contribute to that here. The contributions to jurisprudence and the stature of the court by this dynamic Chief Justice have stood the test of time.

References: U.S. COURT OF CLAIMS REPORTS, Vols. 17, 20, 44; BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS (1774–1971); WHO WAS WHO, Hist. Vol. (1607–1896); 3 NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 427; DICTIONARY OF AMERICAN BIOGRAPHY, Vol. V (1930); 31 MCCLURE'S MAG. 548, 551–554 (Sep. 1908); TWENTIETH CENTURY BIOGRAPHICAL DICTIONARY OF NOTABLE AMERICANS, Vol. III; WEBSTER'S BIOGRAPHICAL DICTIONARY at 438.

William Adams Richardson

William Adams Richardson

MASSACHUSETTS

12th Judge—1874–1885
3d Chief Justice—1885–1896

William Adams Richardson was born on November 2, 1821, in Tyngsboro, Massachusetts, the son of the Honorable Daniel and Mary (Adams) Richardson (d. 1825), and a descendant of Ezekiel Richardson, an English immigrant who came to Massachusetts about 1630. William A. Richardson came from a distinguished family of public officeholders—a congressman, judges, lawyers, and soldiers of the Revolution. His father was a State senator, one uncle was Chief Justice of the New Hampshire Supreme Court for 22 years, and another uncle was a State senator and brigadier general. When four years old, the future judge's mother died and his father married her sister, Hannah Adams. A half brother, George Francis, was a lawyer and mayor of Lowell, Massachusetts.

In 1837 William A. Richardson entered Groton Academy, later called Lawrence Academy, and entered Harvard College in 1839 where he received his A.B. degree in 1843, his A.M. in 1846, and his LL.B. from Harvard Law School in 1846. He also studied law with his brother Daniel and with his friend, John A. Andrew, later Governor of Massachusetts, who moved his admission to the bar in Boston on July 8, 1846. He began the practice of law in partnership with his brother Daniel at Lowell. In addition to his earned degrees, Judge Richardson received honorary doctor of laws degrees from four institutions of higher learning. Columbian University, Washington, D.C., conferred such a degree upon him in 1873; Georgetown College, Washington, D.C., in 1881; Howard University, Washington, D.C., in 1882; and Dartmouth College, New Hampshire, in 1886. He was a professor of law at Georgetown Law School from 1879 to 1894, and on June 28, 1894, was named emeritus professor there. For 12 years he was a member of the Harvard Board of Overseers, serving from 1863 to 1875, and was first elected by the legislature and later by the alumni.

Richardson was elected to the Common Council of Lowell in 1849 and 1853 and was president of the council in 1852 and 1853. His two brothers also served as presidents of the council. He was judge advocate of the militia from 1846 to 1850 with the rank of major, trustee of the Lowell Five-Cent Savings Bank, director of the Appleton Bank, president of the Wamesit Bank, and author

of a publication on the banking laws of the state. He was appointed in 1855 as one of three commissioners to submit revisions of the State statutes and was editor of the annual volume of Massachusetts Statutes for 22 years. He was also quite interested, from his days as a Harvard student, in all statutory law and from 1874 prepared and edited the SUPPLEMENT TO THE REVISED STATUTES OF THE UNITED STATES, and, under congressional authorization, his annotations were printed annually from 1874 to 1891.

On October 29, 1849, William A. Richardson married Anna Maria Marston of Machiasport, Maine (d. 1876), and they were the parents of one daughter, Isabella Anna (1850–1898), who was married to Dr. Alexander F. Magruder of the U.S. Navy.

In 1847, the year following his admission to the bar, Richardson became the justice of the peace for Middlesex County, Massachusetts, serving until 1854. His first major appointment to judicial office was in 1856 when he also became judge of probate for Middlesex County, and since this office was soon to be abolished he was the last to hold it. In 1858 he was appointed judge of probate and insolvency for Middlesex County, the first to hold that office. This change in positions was occasioned by political turmoil in the state. (See the biography of Judge Edward G. Loring.) In 1869 the Governor tendered Judge Richardson the appointment as associate justice of the Superior Court of Massachusetts, but the appointment was declined, as in that year he accepted an appointment by President Grant as Assistant Secretary of the United States Treasury under his good friend, Secretary of the Treasury George Sewall Boutwell, also of Massachusetts. In 1870 he was Acting Attorney General of the United States briefly, and on March 17, 1873, he was appointed Secretary of the Treasury to succeed Boutwell who became a United States senator to succeed Senator Henry Wilson of Massachusetts upon Wilson's becoming Vice President in the second Grant administration.

Judge Richardson was like many people who come to Washington, never intending to stay. He held onto his judgeship in Massachusetts until April 11, 1872, when it finally became apparent that he would not be able, in the foreseeable future, to fulfill his responsibilities thereto. In his Treasury posts, Richardson became a close adviser to the President, especially during the financial panic of 1873. He spent several months in London, England, during 1871 and 1872 managing the Treasury's funding operations. He was credited with wise actions in financial matters and in reducing the Civil War debt, but gained severe congressional criticism over the so-called "Sanborn contracts." Under the law he was empowered to confer three contracts on private citizens to assist, on a commission basis, in recovering unpaid taxes. One of these

contractors, John D. Sanborn, sought collections from all the railroads, which had powerful congressional friends and enemies. When the Secretary refused a House congressional investigating committee some evidence it demanded, the committee recommended, privately, that the President remove his Secretary of the Treasury. The investigating committee had found that he deserved "severe condemnation" but found nothing impeaching his integrity. H.R. Rep. No. 559, 43d Cong., 1st Sess. (1874). On June 2, 1874, at 52 years of age, he was commissioned an associate judge of the U.S. Court of Claims, and took his oath of office on November 23, 1874, succeeding Judge Samuel Milligan of Tennessee, deceased. On January 20, 1885, President Chester A. Arthur named Judge Richardson as the court's third Chief Justice, succeeding Chief Justice Charles Daniel Drake of Missouri, retired. He served as Chief Justice until his death in Washington, D.C., on October 19, 1896, his total tenure on the court exceeding 21 years. It is remarkable that in his lifetime Judge Richardson was appointed, or declined appointment, to five judgeships with life tenure.

Judge Richardson had been a Whig in his youth but followed Lincoln into the new Republican Party. His biographers describe him as an excellent, well-liked judge, who was courteous, terse, and unassuming. He seldom filed a dissent. In addition to his judicial duties he found time for teaching, writing, and world travel. He made 19 trips across the Atlantic. In 1875 he made a trip around the world with his wife and daughter. President Grant gave him a handwritten letter of introduction to the American embassies. He was also fortified with a letter from the Secretary of State and a letter to the Pope from the Bishop of Boston. He left his wife and daughter to spend the winter in Paris while he returned to his judicial duties. Mrs. Richardson took ill and died in Paris on March 26, 1876. The judge, an active member and trustee of All Souls' Unitarian Church, 16th and Harvard Streets, Washington, D.C., gave the church a stained-glass window in 1881 in her memory. In the judge's later years he moved from the house he had rented on H Street, N.W., between 14th and 15th Streets, one block from the present courthouse, and built a home for his married daughter and her husband. This house is variously reported by his biographers as on the northeast corner of H Street, N.W., at either 17th or 18th Street. He died in this home after a short illness, a few days short of being 75 years old, and was buried beside his wife in Oak Hill Cemetery, Washington, D.C., on October 21, 1896, following a funeral service in All Souls' Unitarian Church.

When Judge Richardson first joined the court, its quarters were in the Capitol. In 1879, however, the court was moved into the Freedman's Bank Building on Pennsylvania Avenue, also occupied by the Department of Justice. The Riggs National Bank now stands at this location close to the new U.S. Court of Claims building which was dedicated on September 20, 1967.

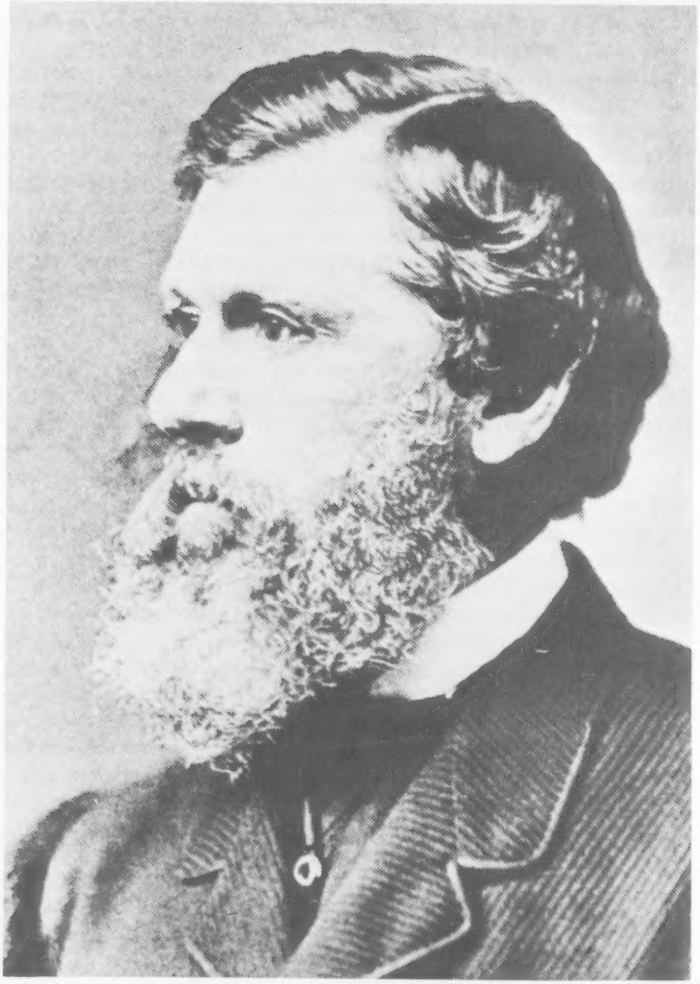
Judge Richardson was active in numerous historical and genealogical societies in Massachusetts, New Hampshire, Maine, and the District of Columbia. He was a trustee of Lawrence Academy at Groton, Massachusetts, and of Howard University, Washington, D.C. He was a member of the Sons of the American Revolution, a 33d degree Mason, and a Knight Templar. He was the author of numerous articles on legal and financial subjects and these references are collected by his biographer, Frank Warren Hackett, in a book privately printed in 1898 which is in the Library of Congress. Of special interest to the court is his "History of the Court of Claims" appearing in volume 17 of the U.S. COURT OF CLAIMS REPORTS.

So much has been written about and by Judge Richardson that it can hardly be summarized within the limitations of space here. We gain some insight into the man's character, however, from all of this and from the high appraisal of his work and abilities by the prominent members of the bar who spoke at the memorial ceremony for him at the court on November 20, 1896.

Judge Richardson was a temperate man who enjoyed good health. Except for one week, he never missed a day of court for almost 23 years. The key to his character was his intense love of legal work. He was a quiet man, practical, modest, and methodical, yet quick to see the point of a case. He eschewed general society and the club, but was said to be a fine conversationalist. He was a man of medium height and size, of even temper, careful about details, and "an indexer." He took great delight in the detailed work required by indexing. He did not care for light reading, cards, or billiards. His peers described him as one who "never delayed justice to any," was "without sectional bias," was "jealous of the dignity and importance of the court," was "of wholesome integrity," was "industrious * * * without blemish on his judicial career," was "free of judicial tyranny and the insolence of office," and was "content to be useful." Senator Boutwell and Judge Lawrence Weldon were among the many who thus described him at a ceremony presided over by his colleague, Judge Charles C. Nott, who would succeed him as Chief Justice.

References: U.S. COURT OF CLAIMS REPORTS, Vols. 17, 32; 4 NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 17; WHO WAS WHO, Hist. Vol. (1607–1896); TWENTIETH CENTURY BIOGRAPHICAL DICTIONARY OF NOTABLE AMERI-

CANS, Vol. IX; DICTIONARY OF AMERICAN BIOGRAPHY, Vol. XV (1935); F. W. HACKETT, A SKETCH OF THE LIFE AND PUBLIC SERVICES OF WILLIAM ADAMS RICHARDSON (privately printed 1898); J. A. Vinton, *The Richardson Memorial* (1876); Harvard Grads. Mag. (Dec. 1896).



John Chandler Bancroft Davis

John Chandler Bancroft Davis

NEW YORK

13th Judge—1877–1881
Reappointed—1882–1883

John Chandler Bancroft Davis, who achieved the distinction of being appointed three times as Assistant Secretary of State and twice as an associate judge of the U.S. Court of Claims, and who was the uncle of Judge John Davis of the Court of Claims, was further distinguished by his ancestry. He was born in Worcester, Massachusetts, on December 29, 1822, the son of "Honest John" (1787–1854) and Eliza (Bancroft) Davis (1791–1872). His father was twice elected Governor of Massachusetts and twice to the United States Senate as a Whig. His mother, the daughter of Reverend Aaron Bancroft of Worcester, was a sister of the Honorable George Bancroft, historian, diplomat, and statesman, also born at Worcester, who, as Secretary of the Navy under President Polk, planned the Naval Academy at Annapolis in 1845. The principal building at the Academy, Bancroft Hall, was named after George Bancroft. A life-size portrait of George Bancroft hangs in the main dining room of the Metropolitan Club in Washington, D.C. The earliest Davis ancestor was Dolor Davis of Kent, England, who came to Plymouth, Massachusetts, in 1634 and settled at New Towne, now Cambridge, Massachusetts.

Bancroft Davis, as he was usually known, attended the Worcester public schools and entered Harvard College with the class of 1840. Biographers record that he was "unjustly suspended" in his senior year and did not return to college, but was, nevertheless, given an A.B. degree in 1847. He received an honorary LL.D. degree from Columbia College, New York, in 1887.

Bancroft Davis studied law privately and was admitted to the Massachusetts bar at Worcester in 1844 and the New York bar in 1853. He opened a law office in New York City but received an appointment in 1849 from President Zachary Taylor as Secretary to the American Legation in Great Britain where he also served as Acting Charge d'Affaires. On November 30, 1852, he resigned from the diplomatic service and returned to his profession in New York with the firm of Kent, Eaton & Kent, later Kent, Eaton & Davis. In the years 1854 to 1862 he was the American correspondent for the London Times.

On November 19, 1857, at Weehawken, New Jersey, he married Frederica Gore King, daughter of James Gore King, prominent

banker, president of the Erie Railroad, and a member of Congress from New Jersey. Her uncle, John Alsop King, also served as a member of Congress from New York and was Governor of that state. Her grandfather, Rufus King, was a member of the Continental Congress from Massachusetts, a member of the Constitutional Convention at Philadephia in 1787, Minister to Great Britain, and one of the first United States senators from New York, serving four terms. He was also an unsuccessful Federalist candidate for President in 1804 and 1816. Bancroft Davis and his wife had no children.

Suffering from ill health during the period 1862 to 1864, Davis and his wife lived in Europe on the Riviera. They later settled in Orange County, New York, where he was elected to the New York Legislature in 1868.

The month that President Grant was inaugurated, Bancroft Davis was appointed by him to be the Assistant Secretary to the Honorable Hamilton Fish, Secretary of State. He served in this position until 1871 and achieved distinction as the arbitrator, in the name of the President, in the dispute between Great Britain and Portugal over ownership of Bolama Island, off the west coast of Africa. He resigned in 1871 to accept the appointment as Secretary to the Joint High Commission, established to arrange a settlement between the United States and Great Britain over the dispute arising out of the depredations of the *Alabama,* and other cruisers, during the Civil War. After signing the Treaty of Washington on May 8, 1871, providing for a tribunal of arbitration to meet in Geneva, Davis was assigned, by Secretary Fish, as the agent to prepare and present the American case. S. Exec. Doc. No. 31, 42d Cong., 2d Sess. (1872). The United States was awarded $15,500,000 in gold in settlement of the claims.

On January 24, 1873, Bancroft Davis was reappointed Assistant Secretary of State, but resigned in July 1874 to become Minister to Germany, succeeding his uncle, George Bancroft. He remained in Europe for three years.

On December 14, 1877, Bancroft Davis was commissioned an associate judge of the Court of Claims by President Rutherford B. Hayes and was seated on January 7, 1878. On December 9, 1881, he resigned at the request of President Chester A. Arthur to become Assistant Secretary of State for the third time, this time on a special assignment. The judgeship was held open for him, and he was reappointed to it the following year, serving until November 5, 1883. It is interesting to note that his commission of reappointment, dated December 20, 1882, was signed by President Arthur and by his nephew, John Davis, who was Acting Secretary of State and who, three years later, was himself ap-

pointed a judge of the Court of Claims by President Arthur. During his tenure as a judge, Bancroft Davis wrote 65 opinions, 21 of which were reviewed by the Supreme Court with only two reversals.

Judge Davis again resigned his judgeship on November 5, 1883, to accept an appointment as the Reporter of Decisions for the United States Supreme Court where he served with distinction for 19 years, until October 1902, editing the UNITED STATES REPORTS, volumes 108–186. He succeeded the Honorable Jeremiah S. Black, who before becoming the Reporter for the Supreme Court had been a judge on the Supreme Court of Pennsylvania and Attorney General and Secretary of State of the United States. As the Reporter, Judge Davis also interested himself in classifying and arranging neglected matter of historical value in the archives of the Supreme Court, and assembled this information in the Centennial Appendix of volume 131 of the UNITED STATES REPORTS. Upon his retirement he continued to live in Washington, D.C., where he died on December 27, 1907, two days short of his 85th birthday. Upon his original appointment as judge, he succeeded Judge Edward G. Loring of Massachusetts, retired, and upon his own retirement he was succeeded by Lawrence Weldon of Illinois.

Judge Davis was the author of numerous articles, including: *The Massachusetts Justice* (1847); *Treaties & Conventions Concluded Between the United States of America and Other Powers*, S. Exec. Doc. No. 36, 41st Cong., 3d Sess. (1871); *Mr. Fish and the Alabama Claims* (1893); and *Origin of the Book of Common Prayer of the Protestant Episcopal Church in the United States* (1897). He also kept a careful diary while at Geneva, and it is now preserved in the archives of the Department of State.

Judge Davis was one of the early members of the Metropolitan Club in Washington and served on its board of governors from 1873 to 1875 and again from 1879 to 1882. His memory is preserved with a picture which hangs at the club.

References: U.S. COURT OF CLAIMS REPORTS, Vols. 17, 47; WHO WAS WHO, Vol. I (1897–1942); 11 NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 115; TWENTIETH CENTURY BIOGRAPHICAL DICTIONARY OF NOTABLE AMERICANS, Vol. III; DICTIONARY OF AMERICAN BIOGRAPHY, Vol. V (1930); DICTIONARY OF AMERICAN PORTRAITS at 155; N.Y. Times, Dec. 28, 1907, at 7, col. 6; 86 NATION 14 (Jan.–June 1908); WEBSTER'S BIOGRAPHICAL DICTIONARY at 395.

William Henry Hunt

William Henry Hunt

LOUISIANA

14th Judge—1878–1881

William Henry Hunt was born on June 12, 1823, in Charleston, South Carolina. He was the son of Thomas (d. 1832) and Louisa (Gaillard) Hunt. His father, of English-West Indian colonial ancestry, was born in Nassau, New Providence, and came to the United States about 1800. His grandfather, Robert Hunt, was twice Governor of the Bahama Islands and was president of the King's Council at Nassau. In the United States, Thomas Hunt was a planter, lawyer, and member of the South Carolina Legislature. His wife was of a well-known South Carolina Huguenot family which had settled near Charleston about 1680. One of her brothers, John Gaillard, was a Democratic United States senator from South Carolina for 22 years and was often president pro tempore of the Senate. Another brother, Theodore, was a United States district judge in Louisiana and a judge on the U.S. Court of Appeals for the Fifth Circuit.

William Henry Hunt had three prominent brothers: Thomas, a physician, and Theodore and Randell, both lawyers. Theodore was a Whig member of Congress from Louisiana, State judge, and brigadier general in the Confederate Army. A nephew of William Henry Hunt, Carleton Hunt, was also a Democratic member of Congress from Louisiana, dean of the State university law school, and one of the founders of the American Bar Association.

William Henry Hunt's father opposed the nullification and secessionist views developing in South Carolina and decided to move to Louisiana where the political atmosphere was more to his liking. He died there in 1832. Mrs. Hunt took her five daughters and two younger sons, one of whom was William, to New Haven, Connecticut, to complete their education. William entered the Hopkins Grammar School, a preparatory school for Yale. In 1839 the family returned to New Orleans but William remained to enter Yale College in 1840. In the early part of his junior year, lack of funds forced him to abandon his academic course. After a few months, however, he entered Yale Law School but again was forced to terminate his schooling. He rejoined his family in New Orleans where his brothers, prominent young attorneys, gave him the opportunity of studying law in their office. In 1844 he was admitted to the Louisiana bar and practiced law in New Orleans

until 1878. He was also a professor of civil law briefly in the law school of the University of Louisiana (later Tulane), taking the place of his brother, Randell.

William Henry Hunt was married four times. His first wife, Frances Ann Andrews of Hinds County, Mississippi, whom he married on November 16, 1848, died of tuberculosis eight months after the wedding. On October 14, 1852, in the State of New York, he married Elizabeth Augusta Ridgely, daughter of Commodore Charles G. Ridgely. They made their home in New Orleans where all seven of their children were born. Two years after her death in 1864, he married Sarah Barker Harrison in New Orleans, from whom he was divorced four years later. On June 1, 1871, he married Mrs. Louise F. Hopkins, niece of a prominent New Orleans merchant.

Judge Hunt's fourth son, by his second wife, was named after his father. William Henry Hunt II was born in New Orleans on November 6, 1857. After attending Yale, the son achieved a distinguished career as attorney general of the Territory of Montana, member of the Montana Constitutional Convention, member of the Montana State Legislature, Governor of Puerto Rico, U.S. district judge in Montana in 1904, associate judge of the U.S. Court of Customs Appeals in 1910, and judge on the U.S. Court of Appeals for the Ninth Circuit from 1911 to 1928. It is interesting to note that the successor court to the U.S. Court of Customs Appeals has occupied the same building with the U.S. Court of Claims since 1967. William Henry Hunt II retired in 1928 and died on February 4, 1949, in Charlottesville, Virginia, at the age of 91.

While William Henry Hunt, Sr., did not hold political office until comparatively late in his career, he was always interested in politics. From 1844 to 1854 he was a Whig and then joined the Know-Nothings. In 1860 he supported the ticket of the constitutional Union Party. From 1860 to 1865 he was a Southern Unionist. Early in the Civil War he was embarrassed by being drafted into the Confederate military service and was commissioned a lieutenant colonel. His military activities were confined to drilling troops at New Orleans for a few months. After Admiral Farragut captured the city, he entertained the admiral and his officers. In 1876 he was appointed by Governor Kellogg as attorney general of Louisiana and later claimed election to that office as a Republican. However, as a result of the political compromise by which Rutherford B. Hayes, Republican, became President, instead of Tilden, the Democrats were recognized by Hayes as the victors in the state, and Hunt lost his position when both parties claimed election. In 1877 Hunt came to Washington to present his case to

President Hayes but was unsuccessful. However, he made an impression upon the President for, on May 15, 1878, he was commissioned an associate judge of the United States Court of Claims, taking his oath of office on November 25, 1878. He succeeded Judge Ebenezer Peck of Illinois, retired.

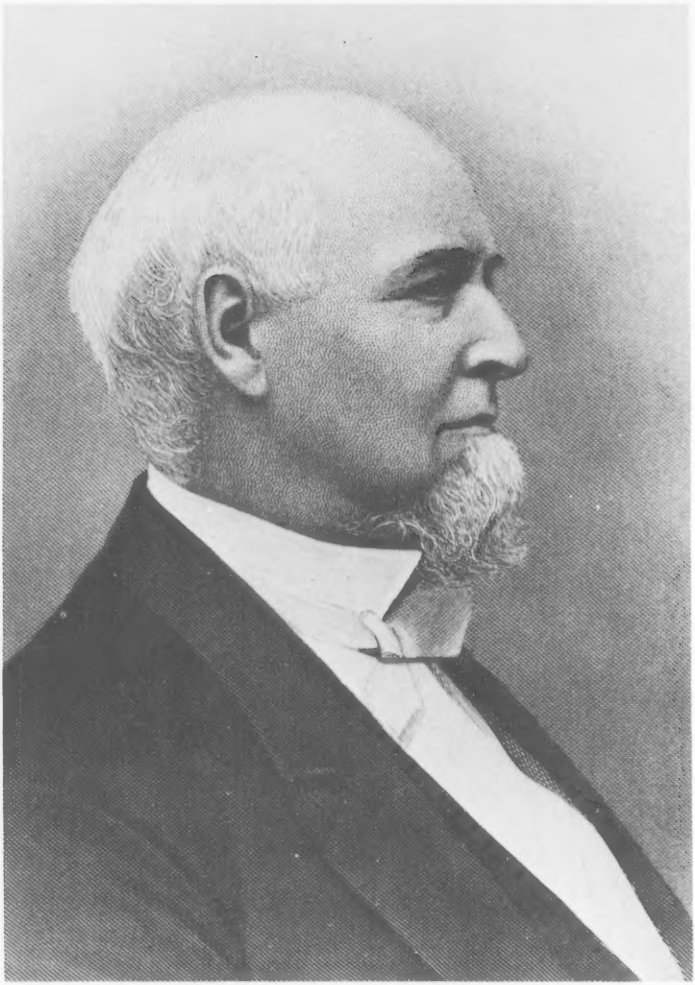
Judge Hunt served on the Court of Claims for about two and one-half years. In December 1880 when Mr. Justice Strong retired from the U. S. Supreme Court, the bar of Louisiana sent a strong, unanimous recommendation to President Hayes to appoint Judge Hunt to the vacancy, but the effort was unsuccessful. In February 1881 President Hayes offered Hunt a judgeship on the U. S. Circuit Court for the Fifth Circuit, which he declined. When James A. Garfield became President on March 4, 1881, he appointed Judge Hunt as Secretary of the Navy and on March 11, 1881, he resigned his judgeship and was succeeded on the Court of Claims by Glenni William Scofield of Pennsylvania. As Secretary he was vigorous in strengthening the Navy, but upon the assassination of the President, the new President, Chester A. Arthur, appointed Judge Hunt as Minister to Russia on April 7, 1882. His son and biographer, Thomas Hunt, wrote that his father did not like this development. However, he went to Russia and there his health, which had not been good since 1878, took a turn for the worse, and he died on February 27, 1884, in St. Petersburg, Russia, at 60 years of age. His body was returned for a funeral service at St. John's Episcopal Church, Washington, D.C., on April 8, and he is buried in Oak Hill Cemetery, Washington.

Judge Hunt's reputation was that of a skillful lawyer in New Orleans where he built a highly successful private practice during the period 1844–1878. His later public service was noted for the competence with which he discharged his responsibilities.

On March 8, 1884, the members of the bar of the Court of Claims adopted resolutions which were presented to the court by a former judge, J. C. Bancroft Davis, who in presenting the resolutions spoke eloquently of the outstanding character and legal abilities of the deceased judge and of his patriotism "when in the trying days before outbreak of the Civil War he stood almost alone in favor of the Government in a community mad with excitement against it * * * and yet when he left that stormy scene to make his home here, not an enemy remained behind, even among his political opponents. * * * [H]is daily life was full of good influences." Chief Justice Drake also spoke feelingly of his former colleague in ordering the resolutions to be recorded in the JOURNAL of the court.

References: U.S. COURT OF CLAIMS REPORTS, Vols. 17, 19; DICTIONARY OF AMERICAN BIOGRAPHY, Vol. IX (1932); TWENTIETH CENTURY BIOGRAPHICAL

DICTIONARY OF NOTABLE AMERICANS, Vol. V; WHO WAS WHO, Hist. Vol. (1607–1896); 4 NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 244; T. Hunt, *The Life of William H. Hunt* (1922); La. Hist. Q. (July 1922); E. S. MACLAY, A HISTORY OF THE U.S. NAVY FROM 1775–1892, Vol. II (1894); Wash. (D.C.) Post, Feb. 28 and Apr. 9, 1884; N.Y. Times, Feb. 5, 1949, at 16, col. 2; WEBSTER'S BIOGRAPHICAL DICTIONARY at 748.



Glenni William Scofield

Glenni William Scofield

PENNSYLVANIA

15th Judge—1881–1891

Glenni W. Scofield was born on March 11, 1817, in Dewittville, New York, a small village on the eastern shore of Chautauqua Lake, the son of Darius and Sallie (Glenni) Scofield. His father was a native of Stamford, Connecticut, and his mother of the city of Newry, Ireland. There were eight children in this family, two daughters and six sons. Two sons became farmers and lived on their farms on the shore of the lake. One son became an editor in Painesville, Ohio, and three became lawyers, two of them in Carthage, Illinois. Glenni W. Scofield began his career as an apprentice printer in Westfield, Mayville, and Jamestown, New York, during the period 1831 to 1836. He then attended the academy in Jamestown and from 1836 to 1840 attended Hamilton College, Clinton, New York. After graduation from Hamilton in 1840, he was a private tutor in Fauquier County, Virginia, for one year, and then served as the principal of the academy at Smethport, Pennsylvania. While teaching to pay off his college debts he studied law, was admitted to the bar in 1842, and commenced his practice in Warren, Pennsylvania, in partnership with the Honorable C. B. Curtis under whom he had studied. He received an honorary degree of LL.D. from Hamilton College in 1884.

On November 20, 1845, Scofield was married to Laura Margaretta Tanner, daughter of Archibald Tanner, a retired merchant. Four children were born of this marriage, two sons and two daughters. One son and a daughter died in infancy.

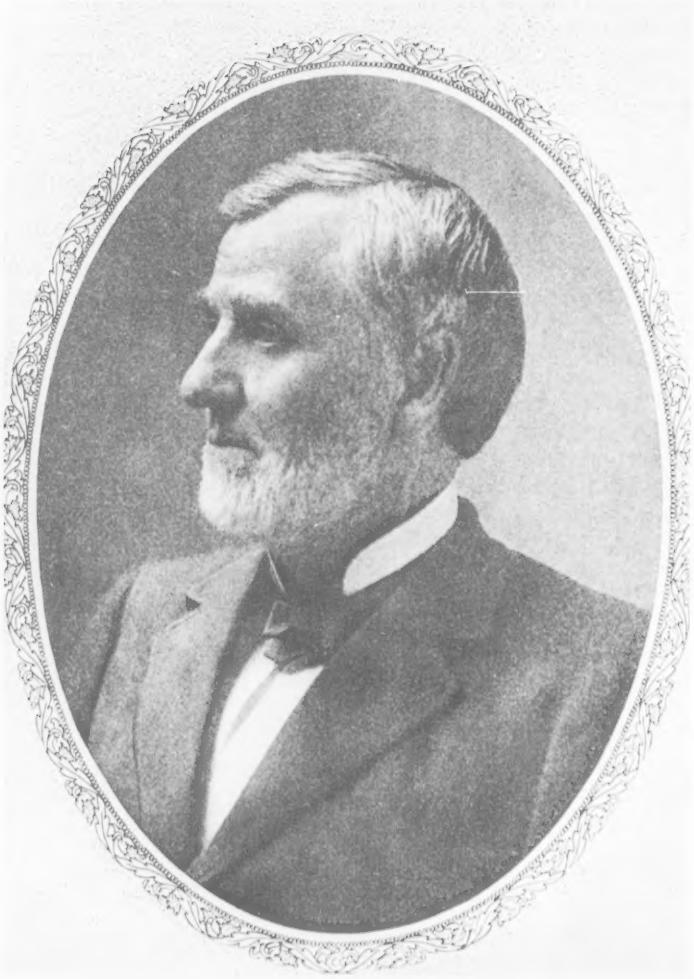
In 1846 Scofield was appointed by the attorney general of Pennsylvania as the district attorney for Warren County. In 1849 he was elected on the Democratic ticket as a member of the State legislature, where he served two terms and then returned to the practice of law. Although a Democrat, in college he had been a member of an antislavery society, had advocated the Wilmot Proviso, favored repeal of the Missouri Compromise, and opposed the Fugitive Slave Law. In 1856, at a public meeting, he formally renounced allegiance to the Democratic Party and became a Republican, as did many Democrats in the North who also opposed slavery. As a Republican he was elected to the State senate by a large majority in a hitherto Democratic district and served from 1857 to 1860. In 1861 he was appointed by Gov. Andrew G. Curtin as

presiding judge of the 18th Pennsylvania Judicial District. He was nominated for Congress by the Republicans and was elected to the 38th Congress and five succeeding Congresses, serving from 1863 to 1875. In the 43d Congress, his last term, he served as one of three at-large members elected on a statewide ballot. Thereafter, he was not a candidate. During his service in Congress he was chairman of the Committee on Naval Affairs for six years, and also served on the Appropriations, Elections, and Indian Affairs Committees. As a member, he addressed all the difficult, controversial subjects of the day, such as emancipation, suffrage, reconstruction, banking, currency, revenue, and the 14th and 15th amendments to the Constitution.

After expiration of Judge Scofield's congressional service, President Grant tendered him an appointment as Commissioner of Indian Affairs, but the offer was declined as he had determined to resume the practice of law and abandon public life altogether. For the next three years he did practice law in Warren, Pennsylvania, but was persuaded by President Hayes to accept the appointment as Register of the United States Treasury. He served in this position from April 1, 1878, to May 20, 1881, when at 64 years of age he was commissioned by his old congressional colleague, President James A. Garfield, to be an associate judge of the United States Court of Claims. He took his seat on the bench on November 28, 1881, and served for almost 10 years, retiring on July 29, 1891. It was only one month later that he died in Warren, Pennsylvania, on August 30, 1891, at 74 years of age. Interment was in Oakland Cemetery, Warren, Pennsylvania.

Judge Scofield had succeeded Judge William H. Hunt of Louisiana, and in turn was succeeded by Stanton Judkins Peelle of Indiana.

References: U.S. COURT OF CLAIMS REPORTS, Vols. 17, 27; BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS (1774–1971); WHO WAS WHO, Hist. Vol. (1607–1896); 11 NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 511; TWENTIETH CENTURY BIOGRAPHICAL DICTIONARY OF NOTABLE AMERICANS, Vol. IX; BIOGRAPHICAL ENCYCLOPEDIA OF PENNSYLVANIA OF THE 19TH CENTURY at 505 (1874); SPEECHES OF GLENNI WILLIAM SCOFIELD WITH BIOGRAPHICAL SKETCH (compiled by Ellie G. Scofield, daughter; privately printed, 1892).



Lawrence Weldon

Lawrence Weldon

ILLINOIS

16th Judge—1883–1905

Lawrence Weldon was born in Zanesville, Ohio, on August 9, 1829, and attended public schools there and later at London Academy and Wittenberg College, Springfield, Ohio. He was employed as a clerk in the office of Ohio's Secretary of State during 1853 and 1854. After studying law in the office of Judge Richard A. Harrison, he was admitted to the Ohio bar in 1854, but moved to Clinton, DeWitt County, Illinois, to practice. He was married to Mary Jane Howard in December 1854.

It was Weldon's good fortune to meet Senator Stephen A. Douglas, one of the lawyers who in that day "rode the circuit" with the judge and other members of the bar trying cases in the various county seat towns in the old Eighth Judicial Circuit in central Illinois. Douglas introduced Weldon to Abraham Lincoln, who was also a circuit rider. They became fast personal friends, sleeping in the same room, eating together, riding about in the same buggy, playing billiards together at the taverns, and sometimes serving as co-counsel and, on other occasions, representing opposing parties in litigation. Some 20 years younger than Lincoln, Weldon admired the courtroom abilities of Mr. Lincoln and Mr. Douglas, and when their great debates took place he was an ardent Lincoln fan. On one occasion, Circuit Judge David Davis of Bloomington, Illinois, was absent and Lincoln sat in his place by agreement of the parties. The jury brought in a verdict for Weldon's client which Lincoln promptly set aside as contrary to the evidence. The decision did not mar their friendship. One of President Lincoln's first acts was to appoint Lawrence Weldon on April 1, 1861, as the United States district attorney for the Southern District of Illinois, in which position he served until 1866. He also appointed Circuit Judge David Davis, whom he greatly admired, as a Justice of the United States Supreme Court in 1862.

In 1860 Judge Weldon was a presidential elector for Lincoln. He was a member of the Illinois Legislature in 1861 but resigned to accept the appointment from President Lincoln as district attorney, as noted above. He practiced law in Bloomington, Illinois, from 1867 to 1883 in partnership with Gen. John McNulta and Judge Ruben M. Benjamin. His home in that city was at 407 East Grove Street and, as a resident of Bloomington, he was an instruc-

tor in the Wesleyan Law School for many years, in addition to practicing law. President Chester A. Arthur commissioned him a judge of the U. S. Court of Claims on November 24, 1883, to succeed Judge J. C. Bancroft Davis. He assumed the duties of that position on December 17, 1883, and served over 21 years until his death, which occurred after a brief illness on April 10, 1905, at 75 years of age. Judge Weldon died in his room at the Hamilton Hotel, 14th and K Streets, Washington, D.C. He was succeeded by George Wesley Atkinson of West Virginia.

Judge Weldon was by all accounts a scholarly man, a hard worker, and an outstanding trial lawyer and judge. The official REPORTS of the court contain 225 opinions authored by him. In volume 30 there appears a 160-page index of the court's first 30 REPORTS which was prepared by Judge Weldon. His last opinion was *McIntyre* v. *Howard*, 40 Ct. Cl. 366 (1905), issued on the day of his death. One of his most famous and interesting opinions is in the case of Admiral Dewey who brought suit for himself and his sailors, claiming a naval bounty arising from their victory at Manila Bay. *Dewey* v. *United States*, 35 Ct. Cl. 172, *aff'd*, 178 U.S. 510 (1900). Another was the sensational case involving the disposition of jewel-encrusted swords and family silver left in the hands of a Creole maiden by a retreating Confederate general in New Orleans. *Myers* v. *United States*, 24 Ct. Cl. 448 (1889).

On April 14, 1905, the bar of the Court of Claims adopted a resolution of regret at Judge Weldon's death, and the following week the court held a memorial service in his honor, addressed by eight members of the bar and by Chief Justice Nott. The proceedings cover 34 pages of the official REPORTS, volume 40. Many complimentary statements were made on that occasion by men who knew him best. They all agreed that the late judge was a man of wit and learning, who had made a great contribution by his service, and whose "most outstanding personal characteristics were kindness and courtesy. He was without enemies and spoke ill of no man." He was even said to be a hero to the clerk's office "where, as to his valet, a judge passes for precisely what he is worth." Former Vice President Adlai E. Stevenson was quoted in the press as saying that Judge Weldon occupied a judicial position on the Court of Claims, second in importance only to that of the Supreme Court.

Judge Weldon had owned land near Clinton, Illinois, and had created a park and lake for public use. His son, Lincoln H. Weldon, a Bloomington, Illinois, lawyer, donated this parkland to the city of Clinton upon his death in 1935. The State of Illinois eventually took it over and enlarged it, and it is still named Weldon Springs State Park. A street in Bloomington was named in honor of Judge

Weldon, and the town of Weldon, Illinois, founded in 1872, was also named for him. As a railroad attorney he had taken a prominent part in bringing the railroad line through the grateful town.

Judge Weldon was survived by his wife and two children: his son, Lincoln H., and his daughter, Mrs. W. C. Hanna, Peoria, Illinois (d. 1911). Mrs. Weldon died in 1910. The judge's funeral was held at the Second Presbyterian Church in Bloomington on April 14, 1905, and he is buried in the family lot in that city.

References: U.S. COURT OF CLAIMS REPORTS, Vol. 40; WHO WAS WHO, Vol. I (1897–1942); N.Y. Times, Apr. 11, 1905, at 11, col. 6; L. Weldon, *Reminiscences of Lincoln as a Lawyer*, 50 MAG. OF HIST. 93 (1895) (No. 2, Extra No. 198, Apr. 4, 1895); 71 CENTURY MAG. 294, 296–297 (1905–1906); Withers Pub. Library & Inf. Center, Bloomington, Ill.; J. Hasbrouck, *History of McLean Co., Ill.*, Vol. 1 (1924); *History of DeWitt Co., Ill.*, Vol. 1 (1910); Daily Pantagraph, Bloomington, Ill., Apr. 11, 1905, at 6; correspondence with Maurice G. Porter, Clinton, Ill. (1976).

John Davis

John Davis

DISTRICT OF COLUMBIA

17th Judge—1885–1902

John Davis was born on September 16, 1851, in Newton, Massachusetts, the son of Hasbrouck (1827–1870) and Martha Whiting (Stickney) Davis. Hasbrouck Davis, a Union general in the Civil War, was a graduate of Williams College in 1845, was admitted to the bar in 1854, and practiced in Chicago where he was also city attorney at 38 years of age. He was one of 170 passengers who perished when the steamer *Cambria* was lost in the North Sea on October 19, 1870. John Davis was of the same prominent New England family heretofore identified in the biography of his uncle, J. C. Bancroft Davis, also a judge of the Court of Claims (1877–1881 and 1882–1883). John's brother was Bancroft Chandler Davis (1853–1934), a lawyer and yachtsman. The grandfather of John Davis was "Honest John" Davis (1787–1854), a United States senator and representative from Massachusetts and twice Governor of that state. The future judge, John Davis, was educated in Boston and at the Universities of Heidelberg, Berlin, and Paris, and was fluent in the French and German languages. He received an honorary degree from Harvard College in 1891.

Upon his return from Europe in 1870, John Davis was appointed a clerk in the State Department, Washington, D.C. In 1872 he served as private secretary to his uncle, J. C. Bancroft Davis, who was then agent of the United States before the tribunal of arbitration at Geneva, and later in the same year he became private secretary to the Honorable Hamilton Fish, Secretary of State. John Davis was appointed the clerk of the court of commissioners of the *Alabama* claims in 1874, was admitted to the bars of New York and the District of Columbia the following year, and practiced his profession briefly in New York City and in Washington, D.C. In 1881 John Davis was appointed assistant counsel for the United States before the French-American Claims Commission, and in July 1882, at 31 years of age, he became First Assistant Secretary of State and was several times Acting Secretary in the absence of Secretary Frederick Theodore Frelinghuysen. At this interval of his life he rendered conspicuous service in effecting settlement of issues arising out of the Chile-Peruvian War.

On October 14, 1875, John Davis was married to Sarah Helen, youngest daughter of Frederick Theodore Frelinghuysen, then a United States senator from New Jersey and later Secretary of State. John and Sarah became the parents of a son, Bancroft Davis, who died at an early age of typhoid fever. Their daughter was Matilda Elizabeth Frelinghuysen Davis (d. 1960), who married George Cabot Lodge (1873–1909), Boston poet, scholar, and secretary to his father, United States Senator Henry Cabot Lodge (1850–1924) of Massachusetts. The children of George and Matilda Elizabeth were: Helena (Baroness Edquard de Streel of Brussels, Belgium); Henry Cabot Lodge II (b. 1902), a senator from Massachusetts, Ambassador to the United Nations, Vietnam, and Germany, and Republican nominee for Vice President in 1960; and John Davis Lodge (b. 1903), who was named after his grandfather, Judge John Davis, and who achieved distinction as a lawyer, congressman, Governor of Connecticut, Ambassador to Spain, and Ambassador to Argentina.

On January 20, 1885, John Davis was commissioned an associate judge of the U. S. Court of Claims by President Chester Arthur. He was only 33 years of age at the time and was the youngest man to have been appointed to the court. He succeeded Judge William A. Richardson upon his elevation to the position of Chief Justice of the court. His uncle, J. C. Bancroft Davis, had resigned from the court only one year and three months before his nephew's appointment. Their careers had paralleled in some significant respects, for both had established reputations in international law and diplomacy. However, John Davis served much longer as a judge, continuing on the court for over 17 years until his premature death on May 5, 1902, at 50 years of age, following two years of rapidly declining health due to Bright's disease. He was succeeded by Francis M. Wright of Illinois.

We gain some insight into the character and reputation of Judge Davis from tributes paid to him by his colleagues and the bar in a memorial service at the Court of Claims on May 16, 1902. There were many speakers on that occasion. They agreed that, of all the outstanding judicial work done by Judge Davis, he was most renowned for his opinions in the three leading French spoliation cases—*Gray* v. *United States*, 21 Ct. Cl. 340 (1886); *Cushing* v. *United States*, 22 Ct. Cl. 1 (1886); and *Hooper* v. *United States*, 22 Ct. Cl. 408 (1887). These historic cases involved claims growing out of the limited maritime war between France and the United States when diplomatic relations were broken between the two countries in 1795. After the French King was executed in 1793, the revolutionary government of France made certain demands upon the United States growing out of a treaty in

1778 and, being rebuffed, resorted to seizures of American ships. After 90 years of contention and bad feeling, the problems were resolved by diplomacy and enactment of the French Claims Act of 1885, ch. 25, 23 Stat. 283, pursuant to which claims of American citizens were resolved by the Court of Claims and paid by the United States in consideration for the dropping of the French claims against this country. The opinions of Judge Davis constitute an authoritative account of the history of America and its relations with France during the critical period and reflect his great understanding of international and civil law, which he had learned in Paris as a student and in the State Department. The famous lawyer, Elihu Root, who served the nation as Secretary of State, Attorney General, and Secretary of War, spoke at the memorial services in high commendation of the contribution of Judge Davis to jurisprudence, as did the Chief Justice of the Court of Claims, Charles C. Nott. The latter also commented on the talents of Judge Davis as a mechanic, patent lawyer, and admiralty expert. He said, "He was born and bred by the sea and from his boyhood was a good sailor."

Judge John Davis was personally popular with the bench and bar, as well as around the Nation's Capital. He was a friendly man of unfailing courtesy and tact, was industrious and patient, and was thorough in his research. His opinions are described as "clear in statement; forcible in language; not ornate nor verbose; lucid, simple, plain. He did not yield to the rude temptations which beset judges. He was dignified without being arrogant; firm without being self-opinionated."

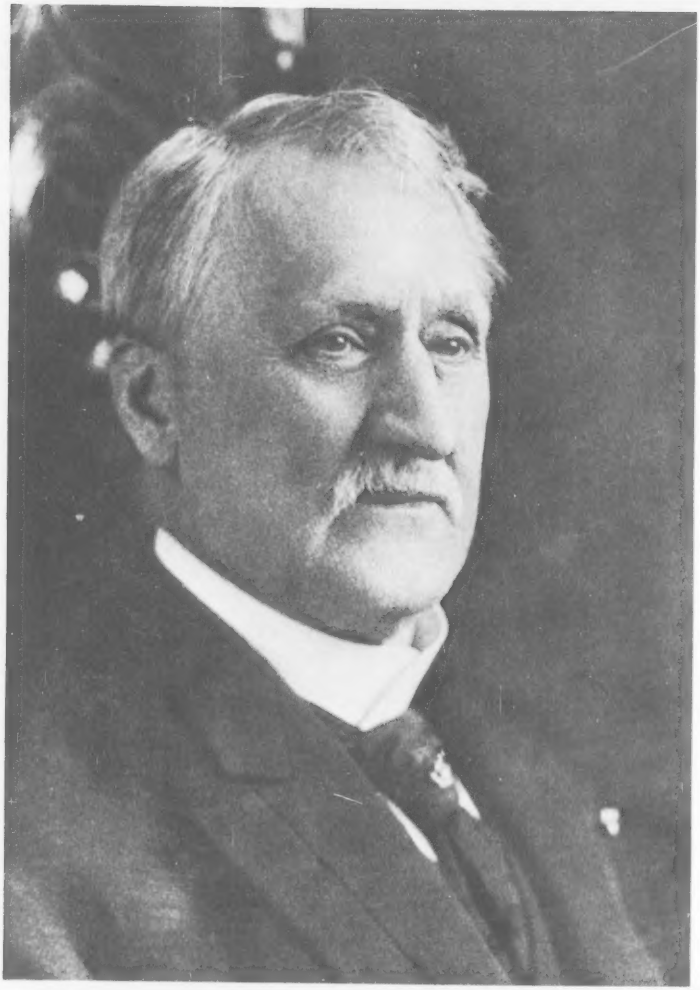
It is perhaps no coincidence that upon the same day the President signed the French Claims Act, January 20, 1885, he signed the commission of John Davis as a judge of the court designated by that Act for the adjudication of those claims requiring a keen knowledge of civil law, international law, and the rights of citizens to judicial redress. The commission was countersigned by the father-in-law of Judge Davis, Secretary of State Frelinghuysen.

Funeral services for Judge John Davis were at St. John's Episcopal Church near the White House and the courthouse. The services were attended by Chief Justice Fuller of the Supreme Court, several United States senators, the Secretary of War, the Ambassadors of France and Denmark, and other distinguished personages and friends. Judges of the Court of Claims served as pallbearers, together with his friends, Secretary of State John Hay, Adm. George Dewey, and Senators Hale of Maine and

Kean of New Jersey. Interment was in Rock Creek Cemetery, Washington, D.C.

Judge Davis was a member of the prestigious Metropolitan Club in Washington, D.C., served as its president from 1892 to 1899, and was on its board of governors from 1881 to 1891 and again from 1899 to 1902. An attractive life-size portrait of him hangs in the main dining room of the club. He was also a member of the Metropolitan Club of New York and of the Chevy Chase Country Club in Montgomery County, Maryland.

References: U.S. COURT OF CLAIMS REPORTS, Vols. 37, 41; WHO WAS WHO, Vol. I (1897–1942); TWENTIETH CENTURY BIOGRAPHICAL DICTIONARY OF NOTABLE AMERICANS, Vol. III; 6 DICTIONARY OF AMERICAN BIOGRAPHY 345–356; 5 NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 544; 26 NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 243; Evening Star, Wash., D.C., May 6 and 8, 1902; N.Y. Times, Aug. 23, 1909, at 7, col. 5; July 2, 1960, at 17, col. 4; July 23, 1960, at 38, col. 6; correspondence with Gov. John Davis Lodge, Westport, Conn. (1976).



Stanton Judkins Peelle

Stanton Judkins Peelle

INDIANA

18th Judge—1892–1906
5th Chief Justice—1906–1913

Stanton Judkins Peelle was born on February 11, 1843, on a farm near Richmond, Indiana, the son of John Cox and Ruth (Smith) Peelle. He was educated in the public schools of Indiana and at Winchester Academy and Valparaiso University, Indiana. His education was interrupted by the Civil War. At 18 years of age he enlisted in the 8th Indiana Volunteer Regiment, Company G, and became a corporal. He reenlisted in the 57th Indiana Volunteer Regiment, Company K, and became a second lieutenant, serving from August 5, 1861, until near the end of the war and participating in the Battles of Pea Ridge, Arkansas, and Stone River and Franklin, Tennessee. He suffered a minor wound. Promptly after the war he studied law under his uncle, Judge William A. Peelle of Centerville, Indiana, and was admitted to the bar in 1866. He commenced the practice of law in Winchester, Indiana, and continued there until 1869 when he moved to Indianapolis where he had his law office until 1892.

A Republican in political sympathy, Peelle took an active part in public affairs in his state. He was assistant district attorney of Marion County, 1872–1873; a member of the Indiana House of Representatives, 1878–1879; a member of the United States House of Representatives, 47th Congress, 1881–1883; and member-elect to the 48th Congress in which he served from March 4, 1883, to May 22, 1884, when he was succeeded by William E. English, who successfully contested Peelle's 87-vote majority in the election, winning, however, by a margin of only three in the House vote. The House was Democratic at the time and Mr. English was favored, not only by this circumstance, but by the fact that his father had been a member and a nominee for Vice President on the ticket with Hancock in 1880. In a speech to the House following the unfavorable vote, Peelle congratulated the winner but suggested such questions could be resolved more properly by a nonpartisan tribunal. He did not try for the House again. It is of special interest to the Court of Claims that, as a member of the House, Peelle participated in the debates on the Bowman Act of March 3, 1883, ch. 116, 22 Stat. 485, which in its present form is 28 U.S.C. § 2509 (1970), the procedure authorized for equitable claims called "congressional references."

In 1888 Peelle was an alternate delegate-at-large in Indiana to the Republican National Convention and in 1892 was a delegate-at-large. During 1891 and 1892 he served as a member of the board of control, Indiana Reform School for Boys. On March 28, 1892, his good friend, President Benjamin Harrison, also a former Indianapolis lawyer and commissioner of the Court of Claims, commissioned Peelle an associate judge of the United States Court of Claims, succeeding Judge Glenni William Scofield. Confirmation by the Senate was prompt and he took his oath of office on April 7, 1892. He served in this position for almost 14 years when he was elevated by President Theodore Roosevelt to the position of Chief Justice of the court, effective January 2, 1906. He served in that position until his retirement on February 11, 1913, a total judicial service of close to 21 years. As Chief Justice he succeeded Chief Justice Charles C. Nott. Justice Peelle's vacancy as an associate judge was filled by Samuel S. Barney of Wisconsin. As a resident of the Nation's Capital, Justice Peelle lived at 2400 Sixteenth Street, N.W., and later at 5900 Connecticut Avenue in one of the first four houses built in the new section known as Chevy Chase, Maryland.

Upon his retirement from the court, Justice Peelle continued an active interest in civic and educational matters. After World War I he served on the War Department Claims Board. He was a member of the faculty, George Washington University School of Law, 1901–1911; president of West Nottingham Academy, Cecil County, Maryland, 1914–1925; president of the Montgomery County, Maryland, school board, 1914–1918; president of the Presbyterian Home for the Aged, 1910–1925; president of the board, Garfield Memorial Hospital, 1911–1925; president of the board, Chevy Chase Village, 1914–1918; vice moderator of the Washington Presbytery and of the Synod of Baltimore, 1920–1921; commander, District of Columbia Order of the Loyal Legion, 1916–1917; president of the board of trustees, Washington College of Law, 1910–1925; member of the board of trustees, Howard University, 1906–1925; an elder of the Church of the Covenant (Presbyterian), Washington, D.C.; and for many years an active member of the Cosmos Club and member of the board of managers of the YMCA of the District of Columbia. In 1896 he was awarded the honorary LL.D. degree by Valparaiso University.

On July 16, 1866, Stanton J. Peelle married Lou R. Perkins of South Bend, Indiana. She died in November 1873 in childbirth, as did the infant. On October 16, 1878, he married Mary Arabella Canfield, daughter of Judge Milton C. Canfield of Painesville, Ohio, who died on August 13, 1915. She was the organizer of the first kindergarten in Indianapolis. On April 16, 1918,

at 75 years of age, he married Bertha Barnitz Byrne, daughter of Col. Albert Barnitz, U. S. Army.

Justice Peelle had only one child, a son by his second wife. Stanton Canfield Peelle was born July 5, 1880, in Indianapolis and died in Washington, D.C., on September 12, 1941. The son was educated in Washington, D.C., receiving an A.B. degree in 1899 from Columbian University, and an LL.B. from George Washington University in 1902. He was a prominent and successful lawyer in Washington and served a term as president of the District of Columbia Bar Association, was a first assistant United States attorney, trustee of the Washington College of Law and professor of law, director of the Mayflower Hotel Corporation, and was active in other enterprises. He was a member of the Metropolitan Club and Sons of the American Revolution. Stanton C. Peelle married Julia F. Ravenel on October 25, 1905, and they had the following children: Stanton Canfield, Jr. (d. 1968), Ellen (Mrs. James Parker Nolan, d. 1970), Elizabeth Ravenel (Mrs. Armistead L. Boothe of Alexandria, Virginia), Mary Canfield (d. 1919), and William Ravenel Peelle of Hartford, Connecticut.

The retirement of Chief Justice Peelle on February 11, 1913, was marked by a special ceremony of the court at which time a commendatory resolution of the bar was received. It was his 70th birthday. The former, retired Chief Justice of the court, Charles C. Nott, then 85 years old and living in New York State, sent a letter praising his successor. Members of the bar who were present remarked upon the prolific output of the Chief Justice, who had authored just short of 300 opinions. Others spoke of his personal characteristics of patience, courtesy, "lack of conceit of opinion," and willingness to change his position if shown to be in error. It was on this occasion that Attorney S. S. Burdett first used the phrase so often quoted to characterize the court in later years. He said: "This is a great court. It holds and speaks the nation's conscience." The employees of the court were also heard and presented the retiring Chief Justice with a silver loving cup as a token of their esteem. Judge Fenton W. Booth, who himself was to become Chief Justice of the Court of Claims in 1928, responded for the court. He spoke in eloquent terms of the court's regard for the legal abilities, character, dignity, and passion for justice of the retiring Chief Justice. Justice Peelle was also recognized as a robust man of good health who seldom missed a day of court. He was a temperate man of very correct habits. To these tributes Chief Justice Peelle responded with humility and gratitude. Judge Charles B. Howry received the advice of the bar association that it would present the court with a portrait of the retiring Chief Justice at a later date. This was accomplished

on October 27, 1913, at a special ceremony, and the portrait was unveiled by his grandson, Stanton Canfield Peelle, Jr. It was later destroyed in a fire which on January 3, 1930, consumed 10 portraits of former Court of Claims judges.* The architect of the Capitol had turned the portraits over to an artist at work in the Capitol Building. They were destroyed while under his care.

On September 4, 1928, at 85 years of age, Chief Justice Peelle, rich in years, honors, and the affection of his fellowman, died in Washington, D.C. He is buried in Rock Creek Cemetery, Washington, D.C. On October 1, 1928, a memorial service was held in his honor by the court. All of the remarks before the court on the occasion of his retirement, presentation of the portrait, and death are preserved in the official REPORTS of the court and were reprinted in a separate, leather-bound memorial book which some of his descendants have.

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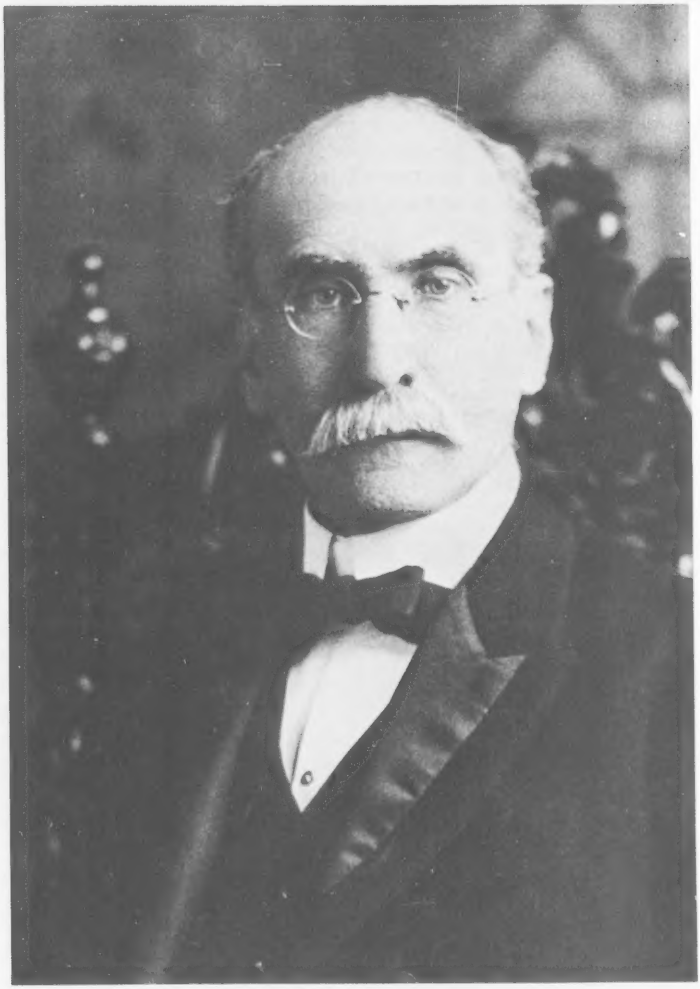
*Judges Atkinson, J. C. Bancroft Davis, John Davis, Drake, Howry, Peelle, Nott, Richardson, Scofield, and Weldon.

References: U.S. COURT OF CLAIMS REPORTS, Vols. 41, 48, 66; BIOGRAPHICAL DICTIONARY OF THE AMERICAN CONGRESS (1774–1971); 14 NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 96; TWENTIETH CENTURY DICTIONARY OF NOTABLE AMERICANS, Vol. VIII; CONGRESSIONAL DIRECTORY, 47th Cong., 1st Sess. at 20 (1882); 4 WASHINGTON—PAST AND PRESENT 407–410 (1930); S. J. Peelle, *History and Jurisdiction of the U.S. Court of Claims* (an address, Jan. 19, 1915), Records of Colum. Hist. Soc'y, Vol. 19 (1916); WHO WAS WHO, Vol. II (1943–1950); WHO'S WHO IN THE NATION'S CAPITAL at 298 (1923–1924).

Photograph courtesy of Mrs. Armistead L. Boothe, Alexandria, Va., granddaughter.



Charles Bowen Howry

Charles Bowen Howry

MISSISSIPPI

19th Judge—1897–1915

Charles Bowen Howry was born in Oxford, Mississippi, on May 14, 1844, the son of Judge James M. and Narcissa (Bowen) Howry, and was descended through both parents from Revolutionary families of Pennsylvania, Virginia, and South Carolina. His father was a native of Virginia who moved to Mississippi in 1836 and attained eminence as a jurist, a State senator, and as one of the founders of the University of Mississippi. The paternal grandfather of Charles Bowen Howry was the Reverend Daniel Howry.

At the outbreak of the Civil War, young Howry was a student at the University of Mississippi, but in March 1862, at 17 years of age, he enlisted as a private in Company A, 29th Mississippi Infantry of the Confederate Army. He was promoted to the rank of first lieutenant during the war and participated in many minor engagements and in the major Battles of Chickamauga, Lookout Mountain, Missionary Ridge, Resaca, New Hope Church, Peach Tree Creek, Atlanta, Jonesboro, and Franklin. He was severely wounded at Franklin and surrendered with General Johnston's Army at Bennett's Place, near Durham, North Carolina. He accepted his parole in good faith and returned home.

Returning to the university after the war, he completed his education, received his LL.B. degree in 1867, was admitted to the bar the same year, and began the practice of law in Oxford. He was awarded the honorary degree of LL.D. by the University of Mississippi in 1896. In 1880 he was elected to the Mississippi Legislature and served four years. In 1885 he was appointed United States district attorney for the Northern District of Mississippi, a post he held through 1889 during the first administration of President Cleveland. The President offered Howry a diplomatic post in South America, which he declined. He also declined an appointment by Governor Alcorn as State attorney general. Howry was a member of the Democratic National Committee from 1891 to 1896. In August 1893 he accepted the appointment as Assistant Attorney General of the United States in charge of the defense of Indian depredation claims. He then came to Washington, D.C., where he spent the rest of his long life at his home at 1424 Sixteenth Street, N.W.

On January 28, 1897, President Grover Cleveland commissioned Howry an associate judge of the Court of Claims, and he took his judicial oath of office on February 8, 1897. On March 15, 1915, after 18 years of service, he retired as an active judge and thereafter practiced law in Washington, D.C., until his death from heart failure on July 20, 1928, at 84 years of age. He is buried in Oxford, Mississippi. Judge Howry ascended to the bench to fill the vacancy of Judge Charles C. Nott upon the latter's elevation to the position of Chief Justice of the court. Upon Judge Howry's retirement he was succeeded by George E. Downey of Indiana. Early biographers record that Judge Howry twice declined an appointment to be Chief Justice of the Court of Claims because of conditions attached thereto by President Wilson who wanted a commitment that the judge would thereafter retire upon request.

Judge Charles Bowen Howry participated in many important and difficult cases and achieved a reputation as a hard worker, a diligent scholar, and a Southern gentleman whose kindness, patience, and courtesy was much appreciated by the bar in the days when argument before the court was unlimited and, with affidavits, was the method of offering the facts to the judges. His many opinions may be found in the official REPORTS, volumes 32–50. During retirement Judge Howry was chairman of a board of arbitration in 1916 to decide a dispute between 12 railroads and the Switchmen's Union. He was also special counsel for the U. S. Department of Labor in 1918–1919. He was a member of the Society of International Law, National Association for Constitutional Government, Sons of the American Revolution, the American and Mississippi Bar Associations, the Mississippi State Historical Society, and the University and Chevy Chase Clubs in Washington. In college he was an organizer and charter member of the Sigma Alpha Epsilon fraternity. He was a trustee of the University of Mississippi from 1882 to 1894. Judge Howry served as the elected lieutenant general and supreme commander of the Army of Northern Virginia, United Confederate Veterans. He was always a staunch Democrat and Presbyterian, a conservative, and an advocate of sound money.

Judge Howry, a Confederate veteran, and Judge Peelle, a Union veteran, served together on the court and were close friends. One day Peelle was wondering whether it was he who had wounded Howry in the Battle of Franklin. Howry, known for his dry wit, said that he did not think that was possible because "from the position you occupied you would have had to shoot clear through a tree, for I was hiding behind it." Judge Howry's confirmation had been opposed by some Northern senators who feared his ability to sit in impartial judgment on claims arising

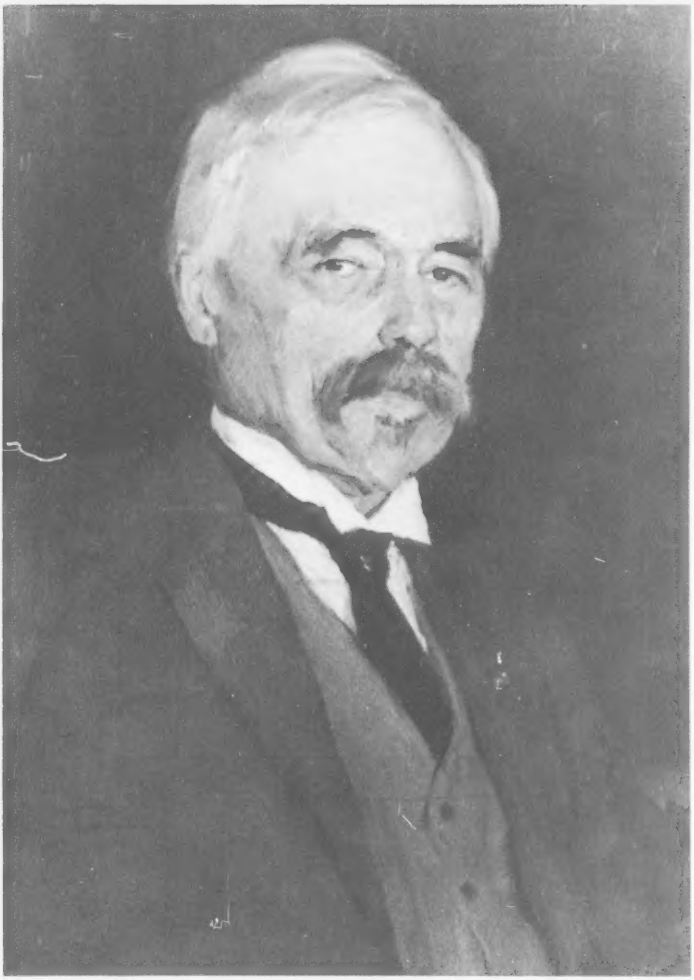
from the Civil War. His record on the court demonstrated that this fear was quite unfounded. Many of these claims were by civilians for destruction or taking of property by the Union Army. It was necessary for them to plead and to establish their loyalty in order to recover. After one protracted argument about loyalty by several claimants, Howry remarked: "From what I have heard today, I am convinced that only two disloyal citizens resided in Mississippi—Jefferson Davis and me!"

Judge Howry has been described as a man of small physical stature and delicate constitution, whose work on the court was sometimes performed under considerable pain and discomfort. He had a busy family life. He was married three times and had seven children. On January 14, 1869, he married Edmonia Beverley Carter, daughter of Dr. Robert O. Carter of Oxford, and they had three children: Lucian Beverley, Willard Carter, and Maude. On July 21, 1880, he was married to Harriet Holt Harris, daughter of Dr. Sampson Harris of Columbus, Mississippi, by whom he had four children: Charles Bowen, Jr., Hallie Harris, Elizabeth Butler, and Mary Harris. On July 25, 1900, he was married to Sallie Bird Smith, widow of Buckingham Smith and daughter of Col. Pickens Butler Bird of Monticello, Florida. The last Mrs. Howry died in July 1942 at 81 years of age, at the home of her nephew, Judge Thomas B. Bird, Monticello, Florida.

Upon the occasion of Judge Howry's retirement, a ceremony was held at the court in his honor on March 15, 1915. At that time the court received a resolution from the Court of Claims bar in praise of Judge Howry's distinguished service on the court. A dozen leading members of the bar spoke in tribute of him and discussed some of his leading opinions. He was, up to that time, the only man who had served on the court who had ever argued a case before it. Employees of the court also presented a resolution and "a gold mounted umbrella, suitably engraved." Judge Booth spoke for the court, as did Chief Justice Campbell. Judge Howry made a gracious and thoughtful response. One of the members of the bar, a New England man and Union supporter during the Civil War, remarked that the bar had considered filing a writ of *ne exeat* with the President to try to prevent Judge Howry's resignation, but had concluded that President Wilson would not accept the writ. Thus, the respect and affection of the bar was demonstrated for the judge who happily could witness it. He was memorialized upon his death with additional tributes by the bar and the court at a session on October 1, 1928.

References: U.S. COURT OF CLAIMS REPORTS, Vols. 50, 66; WHO WAS WHO, Vol. I (1897–1942); TWENTIETH CENTURY BIOGRAPHICAL DICTIONARY OF NOTABLE AMERICANS, Vol. V; WHO'S WHO IN THE NATION'S CAPITAL at 195

(1923–1924); DICTIONARY OF AMERICAN BIOGRAPHY, Vol. IX (1932); 22 NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 55; N.Y. Times, Aug. 1, 1942, at 11; Omaha World Herald, Nov. 20, 1894; New Orleans Picayune, July 10, 1894; Sykes, *Walthall's Brigade*, Miss. Hist. Soc'y, Vol. I (1916).



Francis Marion Wright

Francis Marion Wright

ILLINOIS

20th Judge—1903–1905

Francis Marion Wright was born at Brier Ridge Farm near Bentonville, Adams County, Ohio, on August 5, 1844, the son of James and Elizabeth (Copple) Wright. He was educated in the public schools and at Ohio Valley Academy, Decatur, Ohio, and in 1867 received his LL.B. degree from the Cincinnati Law College. Admitted to the bar in that year he began the practice of law at Georgetown, Ohio, but in December 1868 moved to Urbana, Illinois, where he first practiced alone and later in partnership with William D. Somers.

In June 1891 Wright was elected a judge of the circuit court for the Fourth Judicial Circuit and in 1897 was elected a judge of the circuit court of the (new) Sixth Judicial District. Soon thereafter he was appointed by the Illinois Supreme Court as one of the appellate judges of the Second District and later transferred to the appellate court for the Third District. On January 13, 1903, he was commissioned by President Theodore Roosevelt as one of the associate judges of the United States Court of Claims in Washington, D.C. He held this position for only two years, resigning on March 17, 1905, to return to Illinois to become the first United States district judge for the Eastern District of the state. He held the latter position until his death on July 15, 1917, in Urbana, Illinois, at almost 73 years of age.

While holding these two federal judgeships, Judge Wright was frequently called upon to render judicial service in the federal district court in Chicago and elsewhere, and in United States circuit courts of appeals. When appointed to the Court of Claims he succeeded Judge John Davis, deceased. When he returned to Illinois, he was succeeded by Fenton Whitlock Booth of the same state, who later became Chief Justice of the Court of Claims and who served over 34 years on the court. Judge Booth in his memoirs related that he desired the newly created district judgeship in Illinois for himself but, while supported for appointment by his senators and Speaker of the House Joe Cannon, he was opposed by the Attorney General who wanted to see someone appointed with experience as a trial judge. At that point his mentor, "Uncle Joe" Cannon, engineered Judge Wright's transfer and Booth's appointment to succeed him.

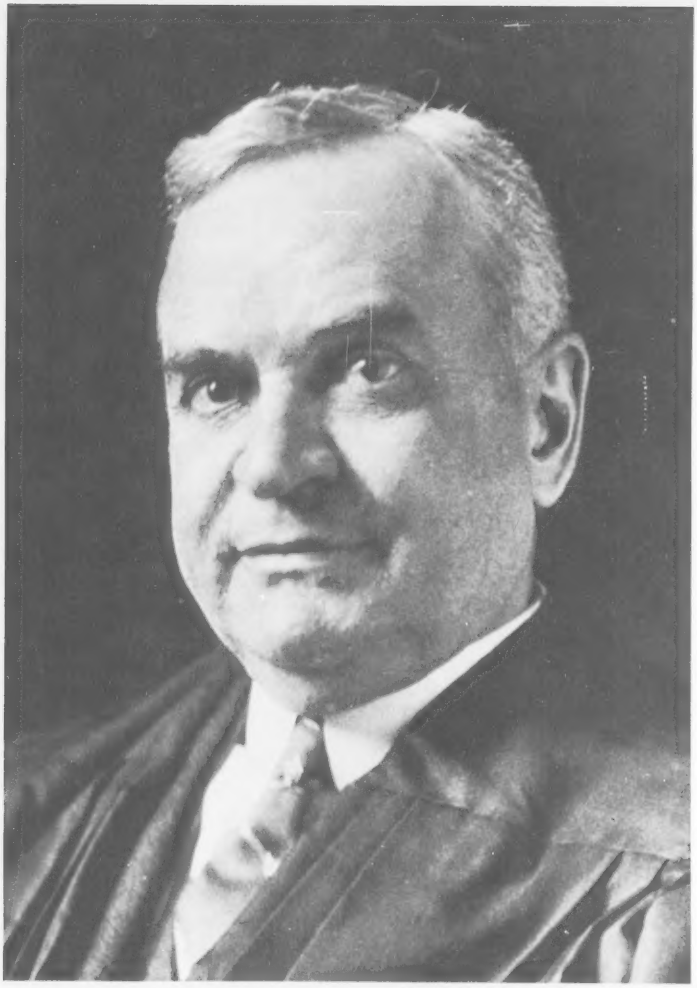
There can be little doubt that Judge Wright was happy to return to Illinois, since his roots were deep in the community where he had been active in business, politics, church, and fraternal activities. He was one of the original stockholders and directors of the First National Bank of Urbana and was president of that institution from 1900 to 1910. He was a member of the Masonic Order, Grand Army of the Republic, and the Loyal Legion of America. He was a Republican and a Methodist. A Union veteran, he had enlisted in June 1861 as a private in Company I, 39th Ohio Volunteer Infantry. He reenlisted in 1863 in Company C of the same regiment. He served in various military campaigns in Missouri, Tennessee, and Mississippi, being under fire in 40 different engagements. At the Battle of Atlanta in July 1864 he was wounded but refused to leave the field and served to the end of the war. He was mustered out as a second lieutenant in July 1865.

Judge Wright was married on July 15, 1868, to Elizabeth West, daughter of John West, a landowner of Decatur, Illinois, and they had four children: Royal, Mary C. (Mrs. Roy Hawkes Griffin), Lora (Mrs. George Bassett Williams), and Marion (Mrs. Charles M. Lewis).

On September 14, 1911, a well-attended ceremony was held in the United States courtroom in the city of Danville to dedicate the new federal courthouse and for the presentation of portraits of Speaker Cannon and Judge Wright by the people of Illinois and by the members of the State bar. Both gentlemen were present for the occasion. There were several addresses by distinguished lawyers and judges in high praise of the Speaker and Judge Wright. The portraits hang in the courtroom to this day.

References: WHO WAS WHO, Vol. I (1897–1942); 28 NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY at 367.

Photograph courtesy of Chief Judge Henry S. Wise, U.S. District Court, Danville, Ill., who also furnished a copy of the transcript of the dedication and presentation ceremony.



Fenton Whitlock Booth

Fenton Whitlock Booth

ILLINOIS

21st Judge—1905–1928
7th Chief Justice—1928–1939

Fenton Whitlock Booth was born in Marshall, Illinois, on May 12, 1869, the son of Lyman (1830–1888) and Fayette Ann (Whitlock) Booth (1830–1902), and was one of a family of seven children. His father was a merchant in Marshall and his uncle, Newton Booth, was Governor of California from 1871 to 1874 and a United States senator from 1875 to 1881. Fenton Booth was a first cousin to Booth Tarkington, the author.

Judge Booth graduated from Marshall High School and attended DePauw University for three years. He received his LL.B. degree from the University of Michigan in 1892, and received honorary LL.D. degrees from Howard University in 1926 and the University of Michigan in 1942. He was married to Anna Harlan of Marshall, Illinois, on May 10, 1893, and they were the parents of one daughter, Margaret (Mrs. Donald Butler Jameson). After Mrs. Booth's death in 1895, Judge Booth was married to Mabel Dana on December 15, 1897, in Lincoln, Illinois, and they became the parents of three daughters: Marian (Mrs. LeRoy B. Miller), Louise (Mrs. Robert Moyer), and Virginia (Mrs. Harry Kylie). Judge and Mrs. Booth also adopted their grandson, Truman Moyer, when his mother, Louise, died. The second Mrs. Booth died in November 1946.

Judge Booth was admitted to the Illinois bar in 1892 and engaged in the private practice of law in Marshall from 1892 to 1905. He was a Republican member of the 40th General Assembly of Illinois, a delegate to the Republican National Convention in 1904, and was commissioned an associate judge of the U. S. Court of Claims on March 17, 1905, by President Theodore Roosevelt. He succeeded Judge Francis M. Wright of Illinois, who returned to his home state to be a United States district judge. Upon the retirement of Chief Justice Peelle of the Court of Claims, Judge Booth was nominated by President Taft to succeed him. However, an election had been held and Woodrow Wilson, a Democrat, had been elected President, and the Senate would confirm no more Taft appointments. The appointment was then made by President Wilson, who named Edward K. Campbell of Alabama to that office. Upon Chief Justice Campbell's retirement, former President Taft, who was then Chief Justice of the United States, visited

President Calvin Coolidge and recommended that Judge Booth be named Chief Justice of the Court of Claims. His nomination was confirmed by the Senate, without a hearing, 30 minutes after it arrived from the White House. Judge Booth assumed his duties as Chief Justice on April 23, 1928, serving until his retirement on June 15, 1939, a total of over 34 years on the bench. At that time he was 70 years of age and to date has had the second longest tenure on the U. S. Court of Claims.

After retirement, Judge Booth moved to Indianapolis where he lived with one of his daughters and later became the chairman of Board No. 10 of the Office of Price Administration during World War II.

While still a boy Judge Booth demonstrated an aptitude for drama and public speaking. Political opponents derided him as the "Toy Pistol Orator." But, he was heard and admired by his congressman, no less a figure than the Speaker of the U. S. House of Representatives, the famous and powerful "Uncle Joe" Cannon, who was also known as the "Czar" of the House. It was upon the recommendation of Speaker Cannon that "Fent" Booth became a federal judge. He had been a member of the bar for only 13 years and was only 35 years of age when appointed. During his long tenure as a judge, he still found time to teach law four nights per week for 25 years at National University and Southeastern University Schools of Law in Washington, and served without pay for seven years as the dean of the Howard University Law School in Washington.

Judge Booth was the seventh Chief Justice of the Court of Claims (changed to Chief Judge in 1948). During his tenure he served with 14 different colleagues and under three chief justices of the court. He was a highly respected and admired judge, and his colleagues and the bar attributed to him all of those qualities which are said to be necessary for a great lawyer and judge. His personal qualities, as given to us by his contemporaries at the court, are described as those of a gentle, modest man who loved his friends, especially his court family whose affection was returned in full. He was not cross or impatient. He was honorable and industrious and had about him an aura of dignity which created respect. Judge Booth was a member of the American and District of Columbia Bar Associations, the Delta Upsilon and Phi Delta Phi fraternities, the National Press Club of Washington, and the Congregational Church. Fishing was his chief recreation and woodworking was his hobby.

On April 21, 1930, a testimonial dinner was given in his honor in recognition of the completion of 25 years of service on the court. This dinner, at the Willard Hotel, was given under the

auspices of the bar of the court. Some 400 guests attended, including Justices of the Supreme Court, judges of the U. S. circuit courts of appeals and other federal courts, members of Congress, and lawyers from the private and Government bars. Judge Booth's remarks upon that occasion gracefully illustrate his judicial demeanor and keen insight into the judicial process.

After his retirement Judge Booth was recalled from time to time to serve on the court when active judges were disqualified. The last such case in which he participated was in the month of his death. *Clark* v. *United States*, 109 Ct. Cl. 444 (1947). The period represented by Judge Booth's service with the Court of Claims thus covered volumes 40–109 of the official REPORTS of the court.

When Judge Booth became Chief Justice he was succeeded in 1928 by Nicholas J. Sinnott of Oregon, as an associate judge, and when he retired as Chief Justice he was succeeded by Judge Richard S. Whaley of South Carolina. Chief Justice Booth died on July 26, 1947, at 78 years of age.

References: U.S. COURT OF CLAIMS REPORTS, Vols. 69, 89, 109; WHO WAS WHO, Vol. II (1943–1950); 40 NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 449; WHO'S WHO IN THE NATION'S CAPITAL at 45 (1923–1924); N.Y. Times, July 28, 1947, at 15; privately published account by Chief Justice Booth, for his children and grandchildren, of his boyhood and career. Some of the foregoing facts have been extracted from that manuscript, entitled "To Whom It May Concern" (1941).

Photograph courtesy of Underwood & Underwood, Wash., D.C.

George Wesley Atkinson

George Wesley Atkinson

WEST VIRGINIA

22d Judge—1905–1916

George Wesley Atkinson was born near Charleston, Kanawha County, Virginia (now West Virginia), on June 29, 1845. He was the son of Col. James and Miriam (Rader) Atkinson and grandson of George Atkinson, a Virginian, and George Rader, a native of Germany.

George W. Atkinson attended the public schools of Charleston and Ohio Wesleyan University where he received an A.B. degree in 1870 and an M.A. in 1873. In 1874 he received an LL.B. degree from Howard University, Washington, D.C., and subsequently attended lectures in law at Columbian University in the District of Columbia. He received honorary degrees from Mt. Union College, DePauw University, U.S. Grant University, the University of Nashville, and the University of West Virginia.

While a student at Ohio Wesleyan University he was married to Ellen Eagan on December 3, 1868, and they were the parents of two sons and three daughters. Mrs. Atkinson died in 1893. On June 24, 1897, he married Mrs. Myra (Hornor) Camden, the widow of Judge G. D. Camden of Clarksburg, West Virginia.

George Atkinson began his career of public service at 23 years of age when he became an assistant county superintendent of schools, serving from 1868 to 1870. In the years 1869 to 1871 he served the Kanawha River Board as a collector of tolls. He was a member of the Charleston board of education from 1869 to 1871 and from 1871 to 1877 he was the postmaster for Charleston, a coveted political appointment which demonstrated his growing prominence in local affairs. He was admitted to the West Virginia bar in 1875 and was elected to the State legislature in 1876. The following year he moved to Wheeling, West Virginia. There he achieved prominence as the editor of the Wheeling Standard in 1877 and 1878. In the years 1879 to 1881 he served in his second federal appointment, becoming an Internal Revenue agent. His harassment of bootleggers in the West Virginia mountains earned him an appointment in 1881 as a United States marshal, serving until 1885. He then ran for Congress on the Republican ticket and the contest was close. The Democratic candidate, John O. Pendleton, presented his credentials to the House, was seated, and served from March 4, 1889, to February

26, 1890, when he was unseated in a successful challenge by Atkinson, who then completed the term, serving to March 3, 1891. He declined to be a candidate for reelection and resumed the practice of law in Wheeling where he was also the editor of the West Virginia Journal from 1891 to 1896.

George Atkinson was elected the ninth Governor of West Virginia, serving from 1897 to 1901. During the next four years, from July 1, 1901, to April 18, 1905, he was United States district attorney for the Southern District of West Virginia. On April 15, 1905, he was commissioned an associate judge of the United States Court of Claims by President Theodore Roosevelt, succeeding Judge Lawrence Weldon of Illinois, deceased. Judge Atkinson served on the court for almost 11 years, until his retirement on April 16, 1916. He was then succeeded by James Hay of Virginia.

Judge Atkinson returned to his beloved West Virginia where he was immediately chosen president of the State bar association. He was active in local affairs until his death on April 4, 1925, at 79 years of age. He is buried in Spring Hill Cemetery, Charleston, West Virginia.

Judge Atkinson was a Knight Templar and Grand Master of the Freemasons of West Virginia during 1876 and 1877. He was also the author of many published articles and tracts, including *The History of Kanawha County* (1876), *West Virginia Pulpit* (1878), *After the Moonshiners* (1879), *Revenue Digest* (1880), *A.B.C.'s of the Tariff* (1882), *Prominent Men of West Virginia* (1895), and *Psychology Simplified* (1897).

A retirement ceremony was held at the Court of Claims on April 17, 1916, in honor of Judge Atkinson. Resolutions of commendation and appreciation for his services, and regret at his retirement, were submitted by the bars of the Court of Claims and the District of Columbia. We have a glimpse of the character of Judge Atkinson from these resolutions which speak of his courteous, kindly and attentive manner, his able and fair opinions, his impartiality, industry, fidelity to duty and integrity, and his personal charm. Speakers included an assistant attorney general, Chief Justice Campbell of the Court of Claims, and the Honorable John W. Davis, Solicitor General of the United States. Mr. Davis had been a young Democratic lawyer in Charleston, West Virginia, when Judge Atkinson, a Republican, was elected Governor of that state. Mr. Davis was later a two-term congressman from West Virginia, Ambassador to Great Britain, and the unsuccessful Democratic nominee for President in 1924. Thereafter he became a New York lawyer with a great reputation as a constitutional expert. His address about Judge

Atkinson appears in volume 51 of the official court REPORTS and is eloquent by today's standards of rhetoric. A brief quotation from his address will illustrate the point. He said:

> Speaking for the Department of Justice and the law officers of the Government, it is a source of sincere regret that the labors of Judge Atkinson in this tribunal should come to an end. His duties here have been discharged with conspicuous fidelity and integrity. This great court is charged with the solemn duty of administering justice between the Government itself and the humblest of its citizens. Unawed by power and unmoved by pity, he has kept the scale of justice even. Mohammed taught that at the last day every judge shall be brought to God's court, held by the neck by an angel; and the angel will raise his head toward the heavens and wait for God's orders; and if God ordereth to throw him into hell, the angel will do it from the height of a 40 years' journey. On that day, so says the prophet, there will come upon even a just judge such fear and horror that he will wish: "Oh, that I had not judged between two persons in a trial for a single day!" I congratulate Judge Atkinson that he can await this last arbitrament without dread or tremor.

References: U.S. COURT OF CLAIMS REPORTS, Vol. 51; WHO WAS WHO, Vol. I (1897–1942); BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS (1774–1971); 12 NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 432; TWENTIETH CENTURY BIOGRAPHICAL DICTIONARY OF NOTABLE AMERICANS, Vol. I; DICTIONARY OF AMERICAN BIOGRAPHY, Vol. I at 409 (1928); CONGRESSIONAL DIRECTORY, 51st Cong., 2d Sess. at 120 (2d ed. 1891); G. Atkinson, *The United States Court of Claims*, 46 AM. L. REV. 227 (1912).

Samuel Stebbins Barney

Samuel Stebbins Barney

WISCONSIN

23d Judge—1906–1919

Samuel Stebbins Barney was born on January 31, 1846, and was the first white child born in Hartford Township, Washington County, Wisconsin. His parents were John (b. 1808) and Adeline Augusta (Knox) Barney (b. 1810), the former a native of Berkshire County, Massachusetts, and the latter of Vermont. William Barney, paternal grandfather of Samuel, was a native of Massachusetts and a veteran of the Revolutionary War who is buried in Jefferson County, New York. The first representative of the Barney family in America was Jacob Barney who was born in 1601 in Berks County, England, and who emigrated to Salem, Massachusetts, in 1634. Samuel is eighth in line from Jacob. John Barney and his wife moved to Wisconsin in 1842. In addition to Samuel, they were the parents of William Knox (1839–1874), John J. (1843–1863), and Cora M. (Mrs. Clarence Powers, 1850–1909). William Knox was captain of Company K, 29th Wisconsin Volunteer Infantry, and served throughout the entire Civil War. John J. served in the same regiment as his brother and was, at 20 years of age, killed on May 16, 1863, near Vicksburg at the Battle of Champion's Hill and was buried on the battlefield. Upon the death of his first wife, John Barney, Sr., married Mary Hornung. To this union were born two children: Charles, who died in infancy, and Frank L. Barney.

Samuel S. Barney attended the elementary public schools of Hartford, Wisconsin, and later Lombard College, Galesburg, Illinois. He did not graduate from the college. From 1869 to 1872 he taught school at Hartford. In 1872 and 1873 he was the editor of the Washington County Republican, later the Hartford Press. Also in 1872 he studied law under the tutorship of Isaac Newton Frisby, senior partner in the law firm of Frisby & Weil at Hartford, was admitted to the Wisconsin bar in 1873, and joined the firm as a junior partner. However, in the years 1876 to 1880 he served as superintendent of schools of Washington County. In 1879 he again formed a partnership with Frisby, but the following year became senior member of the new firm of Barney & Kuechenmeister, a professional relationship which continued until 1906.

On May 18, 1876, Samuel S. Barney married Ellen Sybil McHenry, daughter of Daniel and Sarah (Hurlbut) McHenry. She attended Milwaukee-Downer College and taught school in West Bend before their marriage. They were the parents of Sarah Cornelia (b. 1877), who married Attorney Carl Rix of Milwaukee; John McHenry Barney (b. 1879), who was a graduate of the University of Wisconsin and a lawyer who succeeded his father as a partner in the firm of Barney & Kuechenmeister and who married Hazel Bray of Oshkosh; Ellen Sybil (b. 1882), who graduated from the University of Wisconsin in 1903; and Marion Frisby (b. 1883), who attended the Art Institute in Chicago and Milwaukee-Downer College.

Mrs. Samuel S. Barney met a tragic death on September 3, 1901, at Port Washington, when her carriage was struck by a train at a crossing. At the time of the accident her husband was engaged in the trial of a case in the circuit court at Port Washington.

Judge Barney was a delegate to the Republican National Conventions in 1884 and 1904. In 1884 he was nominated for Congress on the Republican ticket in the then Fifth District of Wisconsin but was unsuccessful in the election. In 1894 he was a successful candidate for Congress and served as a member of the 54th through 57th Congresses from March 4, 1895, to March 3, 1903. He was a member of the House Appropriations Committee, of which the Honorable Joseph G. Cannon of Illinois was then chairman. Judge Barney was not a candidate for renomination in 1902.

A friend and supporter of President Theodore Roosevelt, Barney received his commitment in 1904 for an appointment to the next vacancy on the United States district court but, instead, on December 20, 1905, he was commissioned an associate judge of the U. S. Court of Claims. After taking his oath, he assumed the position on January 2, 1906. Judge Barney was appointed to fill the vacancy created upon the promotion of Judge Stanton Judkins Peelle to be Chief Justice of the court, and he served for 13 years, retiring on April 15, 1919. He was succeeded by Samuel Jordan Graham of Pennsylvania. Judge Barney died in Milwaukee on December 31, 1919, one month short of being 74 years of age, and is buried in Union Cemetery, West Bend, Wisconsin.

On November 3, 1919, proceedings were held in open court to mark Judge Barney's retirement. Speakers on that occasion, in addition to members of the bar, included Chief Justice Edward K. Campbell and future Chief Justice Fenton W. Booth of the United States Court of Claims. The speakers remarked upon the

extensive experience of Judge Barney as a successful trial lawyer in the courts of Wisconsin, the value of this experience to his work as a judge, and his passion for justice, strong sense of duty, understanding of the law, integrity, ability, courtesy, and upright character. Chief Justice Campbell spoke of his "many fine qualities of head and heart" and future Chief Justice Booth said, "It was never difficult to get along with the judge, for personally he was extremely agreeable and congenial." Judge Barney was an active and productive judge who wrote many opinions.

The last days of the judge were saddened by a tragic incident in his bedroom at the Hamilton Hotel where he was suffering from what appeared to be a terminal illness. His messenger, James Dixon, was devoted to his judge and the respect was mutual, but Dixon was unable to adjust to the prospect of Judge Barney's death. One day after attending to the judge with great solicitude, he suddenly pulled out a knife and slashed his throat, falling dead before the judge. Such was the loyalty and affection this kindly man generated in one of those close to him.

References: U.S. COURT OF CLAIMS REPORTS, Vol. 54; WHO WAS WHO, Vol. I (1897–1942); BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS (1774–1971); 28 NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 86; TWENTIETH CENTURY BIOGRAPHICAL DICTIONARY OF NOTABLE AMERICANS, Vol. I; CONGRESSIONAL DIRECTORY, 57th Cong., 1st Sess. at 119 (Jan. 1902); N.Y. Times, Jan. 1, 1920, at 15, col. 2; correspondence with West Bend Community Memorial Library, West Bend, Wisc. (1976); *Washington Co., Wisc., Past & Present*, Vol. II (Carl Quickert ed. 1912).

Edward Kernan Campbell

Edward Kernan Campbell

ALABAMA

24th Judge
6th Chief Justice—1913–1928

Edward Kernan Campbell was born on April 17, 1858, in Abingdon, Washington County, Virginia, the son of James Cummings and Ellen (Kernan) Campbell. His father was a Civil War captain and major in the 48th Regiment, Virginia Volunteers, Confederate States of America, and held various public offices in Washington County. His first American ancestor was Colin Campbell, who came to America from Scotland before 1741, settled in Northumberland County, Virginia, and was the surgeon on General Braddock's expedition in 1755. Judge Campbell's great-grandfather, John Campbell, was a captain during the French-Indian and Revolutionary Wars, was one of the signers of the Fincastle Resolutions of 1775, and was an incorporator of Abingdon Male Academy in Virginia. His grandfather, Edward McDonald Campbell, was a distinguished lawyer and member of the Virginia Constitutional Convention of 1829–1830. David Campbell, Governor of Virginia, was the judge's granduncle.

Judge Campbell attended Abingdon Male Academy and Emory & Henry College, Emory, Virginia, in 1875–1876 and studied law at the University of Virginia in 1882–1883. He was admitted to the Virginia bar in 1883 and began the practice of law in the office of Daniel Trigg in Abingdon. Later that year he moved to Birmingham, Alabama, where he practiced with Forney Johnston until 1913 under the firm name of Campbell & Johnston, specializing in corporation law.

Judge Campbell was married in Birmingham on April 24, 1888, to Loula Elizabeth, daughter of Hardie Brown, a Methodist clergyman of that city, and they had two children: Mary, wife of John Lewis Underwood of Birmingham, and Jean. Judge Campbell was a member of the Mount Vernon Methodist Episcopal Church, South, in Washington, D.C., and for many years was a teacher of the A. B. Pugh Men's Bible Class.

Edward K. Campbell was commissioned the sixth Chief Justice of the Court of Claims on May 22, 1913, by President Woodrow Wilson to succeed Chief Justice Peelle. An appreciation of Judge Campbell's political, professional, and family connections, which gained him consideration for the appointment, may

be gleaned from the fact that he had been campaign manager for the Honorable Oscar W. Underwood of Alabama, who at the time of Campbell's appointment was Democratic floor leader of the U. S. House of Representatives and who had been a strong contender for the Democratic nomination for President in 1912. Underwood became a senator in 1914 and Democratic leader of the Senate during the period 1921–1923. He was again a contender for President in 1924 when his state cast 103 separate votes for his nomination at a deadlocked convention. Judge Campbell's daughter, Mary, was married to Underwood's son, John Lewis. Attorney General J. C. McReynolds, who was in President Wilson's Cabinet and who was soon to be an Associate Justice of the Supreme Court, had been a classmate of Senator Underwood's, and he also recommended the appointment of Judge Campbell to the Court of Claims. The judge's law partner, Forney Johnston, was the son of Senator Joseph Forney Johnston of Alabama. Also, from 1894 to 1912 Judge Campbell was a member of the Alabama Democratic executive committee and chairman of the Democratic congressional committee in Birmingham.

Judge Campbell served on the Court of Claims until his retirement on April 17, 1928, a period of almost 15 years. He was succeeded as Chief Justice by his associate, Fenton W. Booth. After retiring as an active judge, Judge Campbell was appointed a special master in 1931 in the New York-New Jersey beach pollution suit in which New York City's methods of garbage dumping were brought into question. He prohibited dumping off the New Jersey shore, and this decision was upheld by the Supreme Court. *New Jersey* v. *City of New York,* 283 U.S. 473 (1931); 284 U.S. 585 (1931).

Judge Campbell was a member of the Metropolitan, Cosmos, and Chevy Chase Clubs in Washington, D.C. He died in the District of Columbia on December 7, 1938, at the age of 80 years, and is buried in Rock Creek Cemetery, Washington, D.C. He was survived by his two daughters, Mrs. Campbell having died in 1933.

Orders of the court relating to the retirement and death of Chief Justice Campbell state, in part:

> * * * Chief Justice Campbell gave to this Court a degree of industry and devotion which has never been excelled. Through his daily persistence and tireless energy the docket of the Court was brought to the enviable point whereby litigation in the Court was expeditiously disposed of and long and tedious delays eliminated, through reforms in procedure inaugurated at his suggestion.* * * In addi-

tion to the great volume of executive duties which he was called on to perform, vastly increased by the litigation arising out of the World War, Chief Justice Campbell accomplished, at the expense of late hours and exacting labor, his full portion of the Court's opinions. He left a distinguished record for ability and fairness. [89 Ct. Cl. xix (1939); 66 Ct. Cl. xliii (1928–1929).]

References: U.S. COURT OF CLAIMS REPORTS, Vols. 66, 89; 29 NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 172; WHO WAS WHO, Vol. I (1897–1942); WHO'S WHO IN THE NATION'S CAPITAL at 71 (1923–1924); N.Y. Times, Dec. 9, 1938; Evening Star, Wash., D.C., Dec. 8, 1938.

George Eddy Downey

George Eddy Downey

INDIANA

25th Judge—1915–1926

George Eddy Downey was born in Rising Sun, Indiana, on July 11, 1860. He was the son of Justice Alexander C. Downey of the Indiana State Supreme Court and Sophia J. (Tapley) Downey. His father was at one time dean of the law school of DePauw University in Indiana. When DePauw was named Asbury University, George E. Downey was a student there and earned his B.A. degree in 1880. He received his M.A. degree from the same institution in 1883. In 1881, at the age of 21, George E. Downey began the practice of law at Rising Sun, but in 1882 became the editor of the Franklin Democrat, Brookville, Indiana, which position he held until 1884, when he returned to the practice of law. Two years later he moved to Aurora, Indiana. On June 25, 1885, he married Mary C. Wells and they had one son, Alexander.

Downey was elected mayor of Aurora, serving from 1894 to 1902. He was twice elected as a judge of the Seventh Judicial Circuit of his state, serving from 1903 to May 15, 1913, when he resigned to accept an appointment by President Woodrow Wilson as Comptroller of the Treasury of the United States. President Wilson also named him an associate judge of the Court of Claims. He was commissioned on August 3, 1915, took his judicial oath of office on October 4, 1915, and served in that position until his sudden death in office on May 24, 1926, at 65 years of age. Judge Downey succeeded Judge Charles B. Howry and was, in turn, succeeded by John M. Moss of Kentucky. Judge Downey was a Democrat in politics and a Methodist in religion.

On October 11, 1926, the court convened to receive a memorial resolution from the bar of the court in honor of the deceased judge. Tributes on this occasion testified to Judge Downey's legal abilities, devotion to his judicial duties, and fine attributes of character. Speaking for the court, Judge Booth remarked upon the fact that when he was a student at DePauw University, Judge Downey's father was the law school dean and that Judge Downey's brother, Frank, later a lawyer himself, was a classmate. Judge Booth, who served with Judge Downey throughout the latter's 10 years on the court, spoke warmly of the judicial temperament of his colleague, his good humor, and outstanding

contributions to jurisprudence. Chief Justice Campbell directed that the court adjourn on that day in memory of Judge Downey. The tributes to his judicial service are recorded in the official REPORTS of the court.

References: U.S. COURT OF CLAIMS REPORTS, Vol. 63; WHO WAS WHO, Vol. I (1897–1942).

James Hay

James Hay

VIRGINIA

26th Judge—1916–1927

James Hay was born in Millwood, Clarke County, Virginia, on January 9, 1856. He was the son of Dr. William Hay and Emily (Lewis) Hay. Dr. Hay was a surgeon in the Confederate Army. James was the grandson of James and Elizabeth Gwynn (Burwell) Hay and great-grandson of William Hay, who emigrated from Scotland in the mid-18th century and settled at Norfolk, Virginia, where he married Elizabeth Cary, daughter of Miles Cary. Upon her death he married Elizabeth Thompkins, cousin of his first wife.

James Hay was educated in private schools in Virginia and Maryland and at the University of Pennsylvania. He received his LL.B. from Washington & Lee University in June 1877, was admitted to the Virginia bar, and began the practice of law in Harrisonburg, Virginia, in the same year. He also taught school there. However, in June 1879 he moved across the Blue Ridge Mountains to the smaller town of Madison, Virginia, where he considered the opportunities to be greater. They were not long in coming.

James Hay was elected four times to the position of Commonwealth attorney of Madison County, serving from 1883 to 1896. He was elected three times to the Virginia House of Delegates and served from 1885 to 1891. He was elected and served one term in the Virginia State Senate, 1893–1897. It is interesting to note the overlapping dates during which he held these offices. He served four years as a member of the Democratic state committee and in 1888 was elected as a delegate to the Democratic National Convention in St. Louis.

It was as a member of the United States Congress that James Hay received greatest prominence in his career. He was elected from the Seventh Virginia District to the 55th Congress and to the nine succeeding Congresses, serving in the 55th through the 64th Congresses from 1897 to 1916. During his tenure he served as chairman of the Democratic House Caucus for three terms. In 1912 he became chairman of the House Committee on Military Affairs, serving until his resignation on September 30, 1916, to become a judge of the U.S. Court of Claims, to which position he was nominated by President Woodrow Wilson on July 15,

1916. He was commissioned on July 17, 1916. After serving as a judge for just over 11 years, Judge Hay retired on December 1, 1927. Upon his appointment he succeeded Judge George W. Atkinson of West Virginia, and, in turn, was succeeded by William R. Green of Iowa.

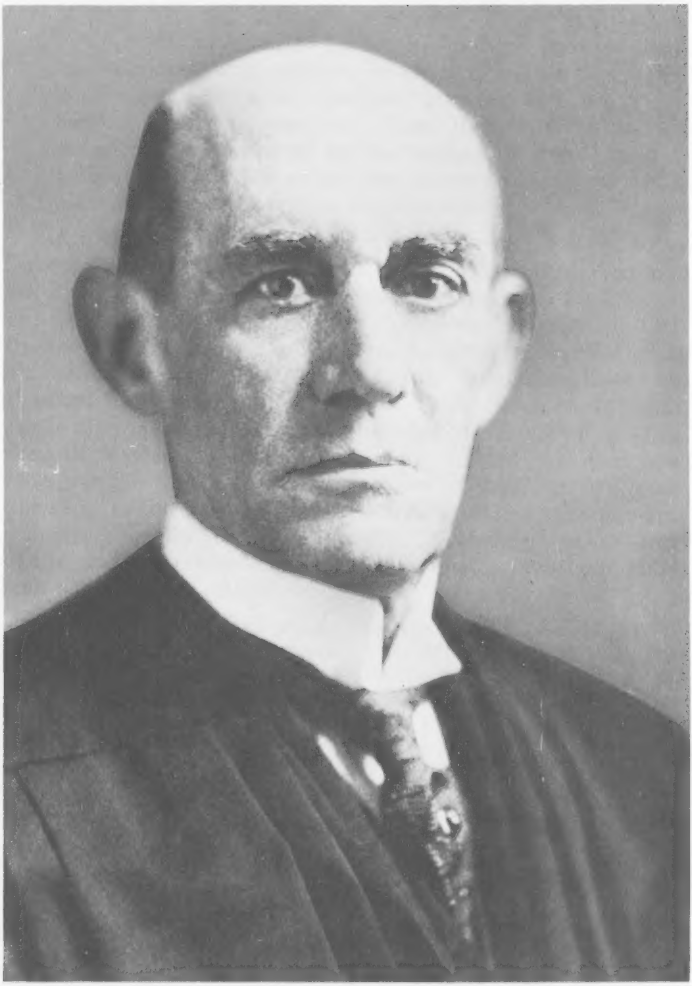
An order of the court on December 15, 1927, relating to Judge Hay's retirement, stated, in part:

> * * * His devotion to his work; his high sense of duty; his willingness and desire to do his part and do it well; his kindness and unfailing courtesy, together with his warm-hearted sympathy, endeared Judge Hay to all of us and cause his retirement to be the subject of deep regret to each of us. * * * We assure him of our constant interest in his welfare and of our love and admiration for him.

Judge Hay was an Episcopalian. He was married three times. On October 1, 1878, he married Constance Tatum, daughter of Dr. R. H. Tatum of Dayton, Virginia. They had two sons, James, Jr., an author, and William. Mrs Constance Hay died in 1886. On June 9, 1891, he married Frances, daughter of W. W. Gordon of Richmond, Virginia. They had two daughters, Ellen and Frances. Mrs. Frances Hay died in 1920. On June 14, 1921, Judge Hay married his secretary, Eloise M., daughter of W. J. Cave of Madison, Virginia. It is of interest to note that Miss Cave was the very first woman employee of the Court of Claims. She came to the court at the time of Judge Hay's appointment.

Judge Hay died on June 12, 1931, in Madison, at 75 years of age, and was interred at Cedar Hill Cemetery, Suitland, Maryland (Washington, D.C.).

References: U.S. COURT OF CLAIMS REPORTS, Vol. 64; BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS (1774–1971); WHO WAS WHO, Hist. Vol. (1607–1896); TWENTIETH CENTURY DICTIONARY OF NOTABLE AMERICANS, Vol. V; WHO'S WHO IN THE NATION'S CAPITAL at 178 (1923–1924); 23 NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 241; CONGRESSIONAL DIRECTORY, 55th Cong., 3d Sess. at 117 (Jan. 1899); 31 WORLD'S WORK 7 (Nov.–Apr. 1915–1916).



Samuel Jordan Graham

Samuel Jordan Graham

PENNSYLVANIA

27th Judge—1919–1930

Samuel Jordan Graham was born on July 27, 1859, in Lexington, Rockbridge County, Virginia, the son of Edward L. and Mary Lucy (Jordan) Graham. He obtained his education in public schools and at Washington & Lee University, Lexington, and at Washington & Lee School of Law.

Beginning the practice of law at Lexington in 1881, he continued there until moving to Pittsburgh, Pennsylvania, in 1890 where he practiced until 1913. During the latter interval he was president for three years of the examining board for admission to the bar of Allegheny County, Pennsylvania. He was a delegate from Virginia to the Democratic National Convention in Chicago in 1884 and a delegate from Pennsylvania to the National Convention in Baltimore in 1912. Following the latter convention, he served as a member of the committee designated to call upon Woodrow Wilson to notify him of his nomination for the presidency. President Wilson named Graham as Assistant Attorney General of the United States in 1913, and he served in that position until the President commissioned him an associate judge of the Court of Claims on July 28, 1919, succeeding Judge Samuel S. Barney of Wisconsin, retired. Judge Graham took the judicial oath of office on September 1, 1919. On May 1, 1930, Judge Graham retired after 10 years, 8 months of service and was succeeded by Richard S. Whaley of South Carolina, who was at that time a trial commissioner of the Court of Claims and who was to become Chief Justice of the court in 1939.

Judge Graham was married three times. On October 31, 1890, he married Sue Finney Neal of Richmond, Virginia. She died in 1919. They had one child, Mary Carter (Mrs. Stuart C. Gillmore). On July 2, 1924, Judge Graham married Leila H. B. Smith, and on October 18, 1938, at 79 years of age, he married E. Norma Purcell. While living in Washington, D.C., the Grahams resided at 1869 Columbia Road, but in retirement they lived in Roanoke, Virginia.

Judge Graham was a Presbyterian. He was a member of the Army-Navy Club of Washington, the Metropolitan and Chevy Chase Clubs, American Society of International Law, American Bar Association, and Sigma Alpha Epsilon, and was a Phi Beta

Kappa. He was the author of *Some Reflections on the League of Nations, Economic Organization of Peace,* and sundry pamphlets and articles.

Judge Graham's first year on the court was marked by litigation over his salary. Appointed to the court five months after enactment of the Revenue Act of 1919, he was compelled to pay an income tax on his salary. He challenged this ruling successfully in the U. S. district court but the Government took the matter to the Supreme Court. Judge Graham also prevailed there. *Miles* v. *Graham,* 268 U.S. 501 (1925). The Supreme Court held that the income tax was a violation of article III, section 1, of the Constitution which prohibited a diminution of a federal judge's salary. The purpose of the constitutional provision was said to be to maintain the independence of the judiciary from political pressures. The same result had been reached by the Supreme Court in *Evans* v. *Gore,* 253 U.S. 245 (1920), where a judge was appointed before, rather than after, the Revenue Act of 1919. These cases were ultimately overruled by *O'Malley* v. *Woodrough,* 307 U.S 277 (1939). Fortunately for Judge Graham, the issue of whether the Court of Claims was or was not a court created under article III did not arise in his case. Under the rationale of the Supreme Court in the case of Court of Claims Judge Thomas S. Williams, Judge Graham probably would have lost. *Williams* v. *United States,* 289 U.S. 553 (1933). The *Williams* case was ultimately reversed, however. *Glidden Co.* v. *Zdanok,* 370 U.S. 530 (1962). United States judges are, nevertheless, required to pay their taxes today, the same as all other citizens. Judge Graham lived in a happier time for the judiciary and enjoyed a tax-free status for 20 years. Prior to 1939 he was something of a hero to other federal judges.

Judge Graham died in Roanoke on January 20, 1951, at the advanced age of 91 years, 6 months. He is buried in the Stonewall Jackson Memorial Cemetery, Lexington, Virginia.

References: U.S. COURT OF CLAIMS REPORTS, Vols. 69, 117; WHO WAS WHO, Vol. III (1951–1960); WHO'S WHO IN THE NATION'S CAPITAL at 162 (1923–1924).

Photograph courtesy of the National Portrait Gallery, Wash., D.C.

John McKenzie Moss

John McKenzie Moss

KENTUCKY

28th Judge—1926–1929

John McKenzie Moss was born January 3, 1868, on a farm in that section of Christian County, Kentucky, known as "Flat Lick," near Bennettstown. As a boy he worked on a farm and attended neighborhood schools, and held a position in the Railway Mail Service from 1888 until 1891. He read law in the office of W. G. and A. T. Ewing in Chicago and attended evening law classes at Kent Law School there. He was admitted to the practice of law in 1893 and located at Bowling Green, Kentucky. On October 17, 1895, he was married to Mary S. Brewer of Danville, Kentucky.

Although a Democrat in politics for many years, Moss eventually made common cause with the Republicans of his state in 1899, and in 1900 was nominated by the Republicans of the Third District as their candidate for the 57th Congress. It was a close election and his opponent, John S. Rhea, the incumbent Democratic candidate, appeared to have won by 156 votes. However, Moss contested the election before the U.S. House of Representatives which declared him elected. He served in the House from March 25, 1902, to March 3, 1903, and was an unsuccessful candidate for reelection to the 58th Congress against Mr. Rhea. Judge Moss had an uncle, James Andrew McKenzie, also born near Bennettstown and a Confederate veteran, who served three terms in Congress, 1877–1883, as a Democratic member from Kentucky.

Following his congressional service, Moss returned to the practice of law in Bowling Green and was elected judge of the Eighth Judicial District of Kentucky in 1909. He was reelected in 1915 and served until 1921 when he resigned. He was appointed assistant general counsel for the Alien Property Custodian on July 13, 1921, and served until January 1, 1922, when he was made general counsel. On February 6, 1922, he became Deputy Commissioner of Internal Revenue and served until his resignation on March 2, 1923, when he became Assistant Secretary of the Treasury. On June 14, 1926, he was sworn in as a judge of the U.S. Court of Claims upon the appointment by President Calvin Coolidge, succeeding Judge George Eddy Downey, deceased. Judge Moss died in office on June 11, 1929,

at 61 years of age, after only three years on the court. He is buried in Lafayette Cemetery, Bennettstown, near Hopkinsville, Kentucky. He was succeeded on the court by Benjamin H. Littleton of Tennessee.

Pursuant to an order of October 14, 1929, the court met on November 18, 1929, for appropriate services commemorative of the life and character of Judge Moss. A memorial resolution was received by the court from the bar, and addresses were delivered by an assistant attorney general, members of the bar, and Chief Justice Fenton W. Booth. A list of the significant opinions of Judge Moss was made a part of the record. The Chief Justice spoke warmly of the personal attributes of Judge Moss, his even temper, diligence, good humor, and devotion to the court and its work. He read into the record a part of the resolution adopted by the Warren County Bar Association of Bowling Green, Kentucky, which paid Judge Moss this tribute:

> He was a man of unusual talent and ability, which his public life and official record attest. His spirit was gentle, his disposition kind, his manner gentlemanly and courtly, his bearing manly, his association a benediction to those fortunate in its enjoyment. He was unfailing in kindness and courtesy to lawyer and litigant and helpful and patient to all mankind of whatever station in life.

References: U.S. COURT OF CLAIMS REPORTS, Vol. 68; BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS (1774–1971); CONGRESSIONAL DIRECTORY, 57th Cong., 1st Sess. at 35 (3d ed. 1902).

Photograph courtesy of Underwood & Underwood, Wash., D.C.

William Raymond Green

William Raymond Green

IOWA

29th Judge—1928–1940

William Raymond Green was born on November 7, 1856, in Colchester, New London County, Connecticut, the son of the Reverend Timothy Franklin Green, a Congregational minister who served in the Civil War in that capacity, and Sarah Maria (Raymond) Green. His sister Ida, whose church was in Havre de Grace, Maryland, was also a Congregational minister. Another sister, Sarah, lived in Malden, Massachusetts, and a brother, Sid, was a banker in California. The Green family came from England in 1685 and settled at Plymouth, Massachusetts. The future judge attended the public schools of Malden, Illinois, and received his A.B. degree from Oberlin College, Ohio, in 1879. This college conferred upon him the honorary degree of LL.D. in 1927. He studied law in the offices of McCoy & Pratt in Chicago and was admitted to the Illinois bar in 1882, but began his practice in Dow City, Iowa, the same year. In 1884 he moved to Audubon, Iowa, where he first practiced alone and later as a member of the law firm of Nash, Phelps & Green. In June 1887 he married Luella Washington Brown of Creston, Iowa, daughter of Artemus Brown, a Methodist clergyman. They were the parents of William Raymond Green, Jr., who became a member of the New York bar, and Margaret (Mrs. Courtney Campbell), both of New York City.

William R. Green was elected a judge of the district court for the 14th Iowa Judicial District and served from 1894 until 1911 when he was elected in a special election, as a Republican, to fill the vacancy in the 62d Congress caused by the resignation of the incumbent from the Ninth District. He was reelected to the 63d and to the seven succeeding Congresses and served from June 5, 1911, until March 31, 1928, when he resigned. He was chairman of the House Committee on Ways and Means in the 68th to the 70th Congresses, 1923–1928, and chairman of the Joint House-Senate Committee on Internal Revenue, 1926–1928.

As a member of Congress Judge Green sponsored repeal of the transportation taxes in 1921, was the author of the Farmer's Emergency Tariff Act in 1921, was chairman of the subcommittee that wrote the cotton schedule of the Fordney-McCumber Tariff Act of 1922, proposed tax reductions for individuals and

corporations in 1924, and wrote the Soldiers' Bonus Act of 1924. He was the author of THE THEORY AND PRACTICE OF MODERN TAXATION (1933) and of a series of articles on taxation and tariff published in the Saturday Evening Post in 1924 under the title *Tariff Facts and Fallacies*. He bequeathed his law library to the Audubon, Iowa, Public Library.

President Calvin Coolidge appointed Congressman Green an associate judge of the Court of Claims, and he took his judicial oath of office on March 31, 1928, succeeding Judge James Hay, retired. Judge Green was the oldest man ever appointed to the court, being over 71 years of age at the time. He served for over 12 years, until May 29, 1940, when he retired from active service. He was, however, immediately recalled and for two more years served on the court when other judges were absent or disqualified. Upon his retirement he was succeeded by J. Warren Madden of Pennsylvania.

Judge Green was a member of the American Academy of Political and Social Sciences, the Cosmos Club in Washington, D.C., the Masonic Order, the Elks, and the Knights of Pythias. He died on June 11, 1947, at his summer home in Bellport, Long Island, New York, and was buried June 16, 1947, in Rock Creek Cemetery, Washington, D.C., where Mrs. Green, who had died in 1922, is also buried. At the time of his death Judge Green was over 90 years old.

References: U.S. COURT OF CLAIMS REPORTS, Vols. 91, 109; BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS (1774–1971); 45 NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 199; WHO WAS WHO, Vol. II (1943–1950); WHO'S WHO IN THE NATION'S CAPITAL at 164 (1923–1924); CONGRESSIONAL DIRECTORY, 69th Cong., 2d Sess. (Jan. 1927).

Nicholas John Sinnott

Nicholas John Sinnott

OREGON

30th Judge—1928–1929

Nicholas John Sinnott was born on December 6, 1870, in The Dalles, Wasco County, Oregon, the son of Nicholas Byrne and Bride Mary (Brass) Sinnott, Irish pioneers who had followed the Oregon Trail. He attended the public schools and Wasco Independent Academy in The Dalles and graduated in 1892 with an A.B. degree from Notre Dame University, Indiana. Upon graduation he commenced the study of law in his hometown in the office of Judge Alfred S. Bennett, one of the most distinguished lawyers then in the Northwest. Upon admission to the bar in 1895, he commenced his practice of law in The Dalles and in 1901 formed a partnership with his preceptor. The firm of Bennett & Sinnott continued until 1912. On September 4, 1901, Judge Sinnott was married to Isidore Irene Purcell of Rathdrum, Idaho, and they were the parents of two daughters and one son.

Sinnott was elected to the Oregon State Senate in 1909 and again in 1911. He was elected as a Republican to the 63d and seven succeeding Congresses, serving from March 4, 1913, until his resignation which was effective on May 31, 1928. On April 20, 1928, President Calvin Coolidge commissioned him an associate judge of the United States Court of Claims to succeed Judge Fenton W. Booth when the latter was elevated to the position of Chief Justice of the court, and he took his judicial oath of office on May 31, 1928. He was the first judge of the Roman Catholic faith to be appointed to the Court of Claims.

Judge Sinnott had the shortest tenure of any judge who served on the court, as he died on July 20, 1929, in Washington, D.C., at 58 years of age, after only one year of service. He was succeeded by Thomas S. Williams of Illinois. Upon his untimely death, Judge Sinnott was buried in St. Peters Cemetery, The Dalles, Oregon.

As a member of the United States House of Representatives, Judge Sinnott was chairman of the Committee on Public Lands from 1919 to 1928 and was involved in several important pieces of legislation affecting national parks. The National Park Highway Act of 1924, championed by Sinnott, authorized the expenditure of public funds to upgrade and develop access highways to national parks. In October 1931 an observation platform

at Crater Lake National Park was dedicated and officially named the Sinnott Memorial Museum. It provides a fine vantage point from which to view the lake and is a structure which has a bronze plaque embedded in its stone wall memorializing Judge Sinnott as a friend of the national parks, particularly this one. It is at this location that the Crater Lake naturalists give lectures during the park season, and it is the focal point for the geological story of Crater Lake. The memorial was authorized by Congress and was constructed with public funds and a donation from the Carnegie Corporation.

Memorial exercises were held by the court on November 18, 1929, in honor of Judge Sinnott and his colleague, Judge John McKenzie Moss, who had died one month earlier. A resolution of the bar spoke in laudatory terms of the character and abilities of Judge Sinnott. The member of Congress from Oregon who succeeded Judge Sinnott in the House was also heard in tribute to his character, abilities, and accomplishments in a brief but illustrious career of public service. Chief Justice Booth concluded the ceremony with his appropriate eloquence, which he was always able to command for those associates he held in highest personal esteem and affection.

References: U.S. COURT OF CLAIMS REPORTS, Vol. 68; BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS (1774–1971); WHO'S WHO IN THE NATION'S CAPITAL at 342 (1923–1924); WHO WAS WHO, Vol. I (1897–1942); CONGRESSIONAL DIRECTORY, 63d Cong., 3d Sess. at 93 (Dec. 1914); 73 SCIENCE (New Series) 384 (Apr. 10, 1931); correspondence with Superintendent, Crater Lake National Park, Ore. (1975).

Benjamin Horsley Littleton

Benjamin Horsley Littleton

TENNESSEE

31st Judge—1929–1958

Benjamin H. Littleton was born on August 27, 1889, in Weatherford, Texas. He was the son of Thomas Jefferson and Anna (McNutt) Littleton, who were the parents of six sons, in addition to Benjamin, and four daughters: Robert, a lawyer, Albert, a banker, Moses, Charles, Morton, Thomas, Rachel, Minnie, Elizabeth, and Mary. By another marriage, T. J. Littleton was the father of six sons and one daughter: Jesse M. and Martin W., both lawyers, James, William, John, a newspaperman, Samuel, and Bessie.

Benjamin H. Littleton attended public schools and Cumberland University Law School, Lebanon, Tennessee, from which he received his LL.B. degree in 1914 and was admitted to the Tennessee bar the same year. He also studied law in the office of an attorney. In 1958 he received an honorary LL.D. degree from Southeastern University, Washington, D.C.

Engaging in the private practice of law from 1914 to 1918, "Ben" Littleton, as he preferred to be known, was appointed Assistant United States Attorney for the Middle District of Tennessee in 1918. He was a Democrat in politics. In 1921 he was appointed as a special attorney in the Office of the General Counsel, Bureau of Internal Revenue, where he was recognized for his talents as a tax lawyer and received the strong sponsorship of Andrew W. Mellon, Secretary of the Treasury, for his appointment by President Calvin Coolidge in 1924 to the Board of Tax Appeals. In 1927 and again in 1929 he was elected Chairman of the Board of Tax Appeals by its members.

On October 15, 1929, President Herbert Hoover nominated Benjamin H. Littleton to be an associate judge of the Court of Claims to succeed Judge John McKenzie Moss of Kentucky, deceased. He was confirmed by the Senate on October 18, commissioned on November 6, and took his oath of office on November 11, 1929. He was 40 years old at the time he became a judge of the court and served with distinction for 29 years until his retirement on October 31, 1958. Thereafter, he continued serving the court as a senior judge but failing health caused him to discontinue judicial activity in 1961. During the 6-month period after Chief Justice Whaley retired and before Judge Marvin Jones

was appointed Chief Justice, Judge Littleton served as Acting Chief Justice of the Court of Claims. He died on July 6, 1966, at 76 years of age, and is buried in Fort Lincoln Cemetery, Washington, D.C. He was survived by his second wife, Marie V. (Womble) Littleton (b. 1893) of North Carolina, whom he had married in 1954. She had been his longtime secretary. His first wife, Clarice Lee of Nashville, had died in 1952. Benjamin H. Littleton had no children. Judge Littleton was succeeded on the court in 1960 by James R. Durfee of Wisconsin.

Throughout his life Judge Littleton was very interested in the Methodist Church and served as chairman of the administrative board of the Mount Vernon Place Methodist Church, Washington, D.C., from 1949 to 1952 and as chairman of its board of trustees from 1952 to 1956. He also served as a trustee of the Lake Junaluska organization of the Methodist Church, spending much time at this encampment and participating in its summer activities. A street there is named after him. He was also treasurer of the board of temperance and general welfare of the Methodist Church, director of the Methodist Corporation, president of the Washington board of trustees of the Young Men's Christian Association, and a member of the Rotary and Cosmos Clubs in Washington. He liked country music and as a young man in Tennessee played with the Grand Ole Opry.

On February 12, 1958, Judge Littleton was honored at a special session of the Court of Claims by members of the bench and bar at which time an oil portrait of the judge was presented to the court by lawyers who had argued cases before him. Speakers for the bar stated that they wished to honor his "great kindness and understanding." Chief Judge Marvin Jones stated that the judicial qualities of a judge fit Judge Littleton "like a garment." The principal speaker was Chief Judge Bolitha J. Laws of the U.S. District Court for the District of Columbia. Other speakers remarked upon the judge's painstaking efforts to be fair and just, as well as upon his extensive research in preparation for the writing of opinions. Judge Littleton responded with his usual quiet deference.

Judge Littleton's death was marked by a memorial service at the court on October 3, 1966. Chairman Robert W. Barker of the Court of Claims Committee of the Bar Association of the District of Columbia spoke of Judge Littleton's basic humility and sensitivity to the feelings of his fellowman, of his deep religious convictions, and of his long, distinguished record of accomplishment. Clarence T. Kipps, Jr., spoke for the judge's former law clerks, and Chief Judge Wilson Cowen, acknowledging these tributes, stated that he "was certainly one of the most

beloved judges who ever served on the United States Court of Claims." The court adjourned that day in memory of Judge Littleton. All of those judges and lawyers who had the privilege of knowing Judge Littleton, working with him, or appearing before him at the court seem to have shared the same opinion of the man, and no one was ever heard to speak in an uncomplimentary way about him, professionally or as a person. Judge Littleton would deny that he was not without fault. He said that he was inclined to be too stubborn, too lengthy in his opinions, and too impatient with those who did not agree with him. History is most unlikely to record this self-evaluation as supported by the weight of evidence when his life and career are weighed in balance. His dissent, however sincere, and he was always sincere, is just not persuasive, or credible. That could not be said of his signed opinions.

References: U.S. COURT OF CLAIMS REPORTS, Vols. 108, 126, 141, 144, 176; WHO WAS WHO, Vol. IV (1961–1968); CONGRESSIONAL DIRECTORY, 80th Cong., 2d Sess. (1948); N.Y. Times, July 8, 1966, at 36; Wash. (D.C.) Post, July 7, 1966, at C8; Bicentennial Committee Biographical Questionnaire, Judicial Conference of the United States, prepared by one of his former law clerks, Harry E. Wood, now a trial judge of the Court of Claims (1976).

Thomas Sutler Williams

Thomas Sutler Williams

ILLINOIS

32d Judge—1929–1940

Thomas Sutler Williams was born on February 14, 1872, in Louisville, Blair Township, Clay County, Illinois. He was the son of William and Nancy Jane (Freeman) Williams, pioneer citizens of Clay County. He was educated at Austin College, Effingham, Illinois, after attending the public schools of Louisville. On June 9, 1897, he was married to Mabel Simpson of Charleston, Illinois, and they were the parents of three children: Harold S. Williams, who until his death was an attorney at Taylorville, Illinois, and two daughters, Ruth (Mrs. Paul Hansen of Richmond, Virginia) and Alice (Mrs. Oscar Browne of Seattle, Washington). Mr. Hansen, after a career with the FBI, became Corporate Director of Industrial Security of the Reynolds Metals Company in Richmond. Captain Browne, upon his retirement from the U.S. Navy, was a professor at the University of Washington in Seattle.

In 1896 Judge Williams was admitted to the Illinois bar and commenced practice in that state in his hometown of Louisville. He was successively elected city attorney (1897–1899), a member of the Illinois State House of Representatives (1899–1901), mayor of Louisville (1907–1909), and prosecuting attorney of Clay County (1908–1915). He became the owner and publisher of the Clay County Republican at Louisville in 1920. In 1926 he moved to Harrisburg, Saline County, Illinois, which was a much larger city, but he always seemed to regard Louisville as his real home.

Thomas S. Williams was first elected to the 64th Congress in 1914 from the then 24th Illinois Congressional District. He was elected eight times to the U.S. House of Representatives. He became one of the leaders of his party in the House where he was chairman of the Illinois delegation, the Illinois member on the Republican Committee on Committees, third ranking member of the Committee on Agriculture, and a member of the powerful Rules Committee. He resigned from Congress to accept the appointment by President Herbert Hoover, who nominated him on October 15, 1929, to the United States Court of Claims. He took his judicial oath of office on November 11, 1929.

Upon his appointment to the court he succeeded Judge Nicholas J. Sinnott, deceased. Judge Williams served on the court for 10 years until his death on April 5, 1940, of heart disease. He was succeeded by Marvin Jones with whom he had served on the House Agriculture Committee. Judge Williams is buried in Cedar Hill Cemetery, Washington, D.C.

The order of the court on May 6, 1940, noting his death, observed that, although he had been in ill health for more than a year, he had continued his work with courage and fidelity. It stated further: "As a Judge of this Court his decisions were always distinguished for the clarity with which he stated his opinions and the broad knowledge of the law which they displayed."

Judge Williams had a legendary power of concentration on his work. Sometimes the clerk of the court would be in his room for five minutes before the judge was aware of his presence. He was a friendly, informal man with a great sense of humor and liked to tease judges, lawyers, and politicians who tended toward pompousness. He was a Mason and a member of the Christian (Disciples of Christ) Church.

The service of Judge Williams on the Court of Claims was marked by an interesting legal episode. When an economy act in 1932 reduced the salaries of federal employees, the Comptroller General applied it to the judges of the Court of Claims under the pretext that they were not judges appointed pursuant to article III of the Constitution, the judicial article, but rather were legislative judges appointed pursuant to article I, the legislative article. Judge Williams contested this by filing a suit in the Court of Claims for back pay. It was then certified to the Supreme Court for decision. The Supreme Court held that judges of the Court of Claims were members of a legislative court, *Williams* v. *United States*, 289 U.S. 553 (1933), thus upsetting what everyone had thought to be the court's true status. Twenty years later, in 1953, Congress declared the U. S. Court of Claims to have been created under article III, ch. 253, 67 Stat. 226, now 28 U.S.C. §171 (1970). Upon reconsideration of the problem, the Supreme Court declared the Court of Claims to be a constitutional court, created under article III. *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962). It was too late for Judge Williams to learn that he was vindicated, but his memory is honored for his stout insistence on the proper status of the court.

References: U.S. COURT OF CLAIMS REPORTS, Vol. 91; BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS (1774–1971); WHO WAS WHO, Vol. I (1897–1942); WHO'S WHO IN THE NATION'S CAPITAL at 413 (1923–1924); N.Y. Times, Apr. 6, 1940, at 17; N.Y. Herald Tribune, Apr. 6,

1940, at 8; CONGRESSIONAL DIRECTORY, 65th Cong., 3d Sess. at 25 (Dec. 1918); correspondence with Willard L. Hart, former clerk of the Court of Claims (1976).

Photograph courtesy of Mrs. Paul Hansen, Richmond, Va., daughter, as well as valuable information through correspondence (1976).

Richard Smith Whaley

Richard Smith Whaley

SOUTH CAROLINA

33d Judge—1930–1939
8th Chief Justice—1939–1947

Richard Smith Whaley was born in Charleston, South Carolina, on July 15, 1874, the son of William B., a cotton factor, and Helen (Smith) Whaley. He attended the Episcopal High School, Alexandria, Virginia, and graduated from the University of Virginia Law School, Charlottesville, in 1897 with an LL.B. degree. After being admitted to the bar of South Carolina in 1897, he commenced the practice of law in Charleston with the firm of Trenholm, Rhett & Miller, later was a partner in Miller & Whaley, and from 1913 to 1930 was in the firm of Whaley, Barnwell & Grimball. While at the University of Virginia he was a member of the football squad and headed the Virginia Athletic Association. He also coached the football team at the University of South Carolina, winning a state championship there.

Demonstrating an early aptitude for politics, he was elected in 1900 as a Democratic member of the South Carolina House of Representatives, and was reelected five successive times, serving two terms, 1907–1910, as speaker. In 1910 he was the chairman of the Democratic State Convention and in 1912 was elected as a delegate to the Democratic National Convention in Baltimore and again in 1920 to the convention in San Francisco. At the 1912 convention he led a demonstration for Woodrow Wilson that lasted one hour and forty-five minutes and was later named to the committee to notify Wilson of his nomination.

Elected to the 63d Congress from the First Congressional District of South Carolina at a special election in 1913 to fill the vacancy caused by the death of the incumbent, Richard S. Whaley was reelected to the three succeeding Congresses, serving from April 29, 1913, to March 3, 1921. He was not a candidate for renomination in 1920. In the years 1923 to 1925 he was chairman of the District of Columbia Rent Commission upon his appointment by President Harding.

On April 6, 1925, Richard Whaley was appointed a commissioner of the United States Court of Claims, and on June 3, 1930, he was commissioned by President Herbert Hoover as an associate judge of the court, succeeding Judge Samuel J. Graham, retired. He assumed the bench upon taking his oath of office on June 4. On June 28, 1939, upon the appointment by President

Franklin D. Roosevelt, Judge Whaley became the eighth Chief Justice of the court, succeeding Chief Justice Fenton W. Booth, retired. He became 65 years of age two weeks later. Samuel E. Whitaker of Tennessee was appointed to fill the vacancy created by his promotion.

Chief Justice Whaley submitted his notice of retirement from the bench to President Harry S. Truman on January 16, 1947, and did not sit thereafter in the decision of cases. His actual retirement, however, did not take place until July 9, 1947, upon the nomination of his successor, Judge Marvin Jones of Texas.

On December 8, 1947, at Hot Springs, Virginia, Chief Justice Whaley was married to Rosa (McWane) Barksdale, originally of Lynchburg, Virginia, and former wife of Dr. Elisha Barksdale, a prominent physician in Washington, D.C. She had three daughters by Dr. Barksdale. Judge Whaley died in Charleston, South Carolina, on November 8, 1951, at 77 years of age, following a major operation. He was interred in Magnolia Cemetery, Charleston.

Chief Justice Whaley was a member of the American, South Carolina, and Charleston Bar Associations, the Chevy Chase and Burning Tree Clubs of Washington, D.C., where he loved to play golf, and was an honorary member of the Sulgrave Club of Washington. He was an Episcopalian.

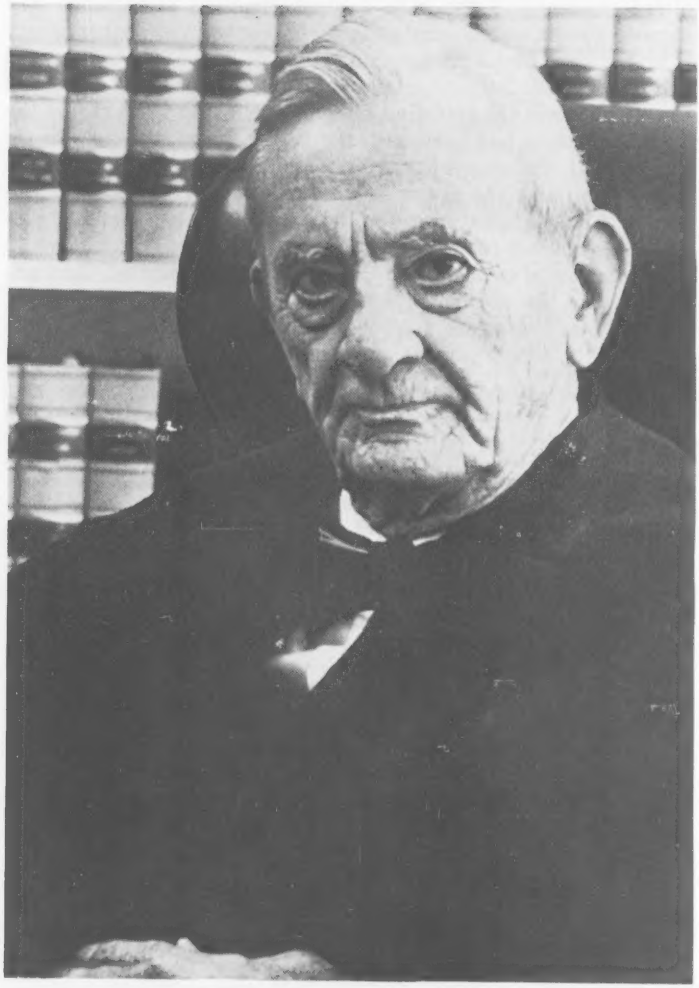
The REPORTS of the court do not contain the record of any memorial service held in honor of Chief Justice Whaley, nor any commemoration by the bar upon his retirement. His contemporaries, however, describe him as a judge who could on occasion exhibit much Southern charm. He was a great friend of United States Senator Pat Harrison of Mississippi, the Democratic leader in the Senate, whose influence at the White House aided his career. Employees and associates regarded him as something of a martinet as an administrator. His tenure as Chief Justice was jocularly referred to as "the reign of Nero." Employees were required to sign in and out at the courthouse door, and the travels of trial commissioners on official business were carefully monitored by long distance telephone. The Chief Justice took great interest in the facilities of the courthouse and kept everyone "on his toes." Many stories of his eccentricities have survived him.

Chief Justice Whaley had a gentler side, and a compassion for the unfortunate. One of his first cases as a young lawyer was to defend, without fee, two young men by the name of Holmes whose family had been slaves of Whaley's grandparents on his mother's side. They were charged with murder, and the evidence against them seemed overwhelming. He had taken the case out of

sentiment for the great assistance the Holmes family had been to his grandparents who, old and feeble, were unable to forage for food during the dark days of the Civil War. The principal prosecution witness was a detective whose credibility the young lawyer had not been able to shake on cross-examination. During a recess and while sitting alone in the courtroom praying for divine guidance in the case, a total stranger approached and showed him an advertisement in the Savannah newspaper where it was evident that a person could get a detective's certificate and a badge for $2. Remembering that he had overheard a man in the corridor ask the detective when he was going to be repaid the $2 the detective had borrowed, the future judge was able to establish that the star witness was a graduate of this "diploma mill." This, plus the young lawyer's well-known interest in repaying a debt of gratitude for the survival of his grandparents at a time when the Yankees had imperiled them, was enough to win an acquittal by the South Carolina jury. Thereafter, throughout his life, he attributed his good fortunes to the power of prayer, total abstinence from alcoholic beverages, and the Democratic Party as a true instrument of God's will on earth.

References: U.S. COURT OF CLAIMS REPORTS, Vols. 109, 120; WHO WAS WHO, Vol. III (1951–1960); BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS (1774–1971); 41 NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 354; N.Y. Times, Nov. 9, 1951; R. S. Whaley, *The Light in the Courtroom*, Guideposts (Feb. 1948); CONGRESSIONAL DIRECTORY, 65th Cong., 3d Sess. at 104 (Dec. 1918).

Photograph courtesy of Underwood & Underwood, Wash., D.C.



Samuel Estill Whitaker

Samuel Estill Whitaker

TENNESSEE

34th Judge—1939–1964

Samuel Whitaker, who preferred to be known as Sam, was born on September 25, 1886, in Winchester, Tennessee, the son of Madison Newton and Florence Jarrett (Griffin) Whitaker. His father was a judge of the Tennessee Circuit and Criminal Court.

Judge Whitaker attended Winchester Normal College from 1902 to 1905, the University of Virginia during 1905 and 1906, and taught in the public schools of Tennessee. He later attended the University of Chattanooga, received his bachelor of laws degree there in 1909, and entered the private practice of law in Chattanooga until the outbreak of World War I. During the war he served first as a captain of cavalry and later as captain of field artillery, and saw duty overseas from 1917 to 1919.

Following his return from Europe at the end of the war, Sam Whitaker served briefly with the Internal Revenue Bureau and the Justice Department before returning to practice law in Chattanooga in the firm of Whitaker & Whitaker from 1921 to 1937. In 1923 and 1924 he was city attorney of Chattanooga and later served as mayor of the neighboring town of Riverview from 1925 to 1929. He undertook some assignments as a special assistant to the Attorney General of the United States in the years 1933 to 1937, and in 1937 President Franklin D. Roosevelt named him Assistant Attorney General for the Claims (now Civil) Division of the Department of Justice, where he served until 1939. On June 23, 1939, President Roosevelt nominated him an associate judge of the Court of Claims, and upon confirmation by the Senate he took his oath of office on July 27, 1939, succeeding Judge Richard S. Whaley upon the latter's elevation to Chief Justice of the Court of Claims. Judge Whitaker served on the court for almost 25 years until his retirement on July 19, 1964. He died about three years later on March 26, 1967, on Easter Sunday, at over 80 years of age, and is buried in Chattanooga. Upon his retirement he was succeeded by Linton M. Collins of Georgia and Washington, D.C.

On June 30, 1913, Judge Whitaker married Lillian Nelson Chambliss, daughter of Chief Justice and Mrs. Alexander W. Chambliss of Chattanooga. They were the parents of Nelson Chambliss (Mrs. Paul Campbell, Jr.) of Chattanooga and Samuel

Estill Whitaker, Jr. At the time of his death, Judge and Mrs. Whitaker had eight grandchildren and one great-grandchild.

Judge Whitaker sat on the bench as an active judge for the last time on June 4, 1964. However, as a senior judge he sat on occasion with his court, as well as on the U. S. Court of Appeals for the Fifth Circuit and as a special master by appointment of the Supreme Court.

Judge Whitaker served on the board of trustees of the New York Avenue Presbyterian Church in Washington, D. C., for many years, and was president of that board in 1953 and 1954. He also served on the board of the Presbyterian Home for the Aged in the District of Columbia, and was active in the rebuilding of both the church and the home. Judge and Mrs. Whitaker gave a large stained-glass window for the sanctuary of New York Avenue Presbyterian Church. He was an enthusiastic sportsman with a keen interest in golf, especially. He was a member of the Burning Tree Club, and served as president from 1957 to 1959. He was also active in the Chevy Chase and Metropolitan Clubs, the National Lawyers Club, and the American and Federal Bar Associations.

On June 11, 1964, a committee of friends sponsored a testimonial dinner in honor of Chief Judge Marvin Jones and Judge Samuel E. Whitaker. These two judges were close friends, served together on the court about the same length of time, and had chosen to retire in the same month. The bar decided to honor them together prior to their taking senior judge status, and several hundred persons were present at the dinner in a major Washington, D.C., hotel. Speeches in honor of the retiring judges were delivered by Chief Justice Earl Warren, Justice Stanley F. Reed (Ret.), Justice Tom C. Clark, their colleague Judge Don N. Laramore, Solicitor General Archibald Cox, and Newell Ellison, the dean of the District of Columbia bar. The President sent a message which was read to the assemblage. The trial commissioners (now trial judges) joined in the tribute with special appreciation for the efforts the two judges had made to enhance their status as judicial officers. The love of these two judges for the court and their work was recognized by all. They complemented each other in their successful efforts to administer justice so as to make this national court better known and respected for its position in the federal judicial system. Mr. Ellison said:

> Constitutions, statutes, juries, and advocates all have their place in our system of law. But, the true greatness of our system resides in judges who do justice. The entire structure of justice that has been created in the English-speaking

> world over these past centuries is built upon the character and integrity of individual judges. The truth is that there is an art to judging that goes beyond knowledge of the law, energy, patience, courtesy, ability to write, and other commonly accepted criteria of judicial competence. And I believe that there is a special and unusual judicial artistry required in the case of a judge who sits daily in judgment on the actions taken by his government.

Judges Whitaker and Jones were such men. When Judge Whitaker died, the bar by resolution at a memorial service on June 5, 1967, paid him further deserved tribute, as did his colleagues. Space limitations here do not permit any detailed account of this, but it is all preserved in the official REPORTS of the court. Finally, on May 15, 1970, at a special session, a longtime friend of Judge Whitaker's, A. Chambers Oliphant, presented the court with a lifelike oil portrait of the judge. The portrait was unveiled by his daughter, Mrs. Paul Campbell. It portrays something of the immense presence and dignity of the man, together with his benign, concerned temperament. In accepting the portrait for the court, Chief Judge Wilson Cowen aptly said:

> He was a man who made vivid and lasting impressions on those who knew him. For my own part, it will remind me that I never met another man who had a greater loyalty to the court, a more intense pride in its standing, or a greater concern that the court fulfill its proper role in the administration of justice.

References: U.S. COURT OF CLAIMS REPORTS, Vols. 166, 167, 179 (374 F. 2d), 192; WHO WAS WHO, Vol. IV (1961–1968); CONGRESSIONAL DIRECTORY, 80th Cong., 2d Sess. (1948); S. Whitaker, *The United States Court of Claims*, 12 J. BAR ASS'N, D.C. 200 (1945).

(John) Marvin Jones

(John) Marvin Jones

TEXAS

35th Judge—1940–1947
*9th Chief Judge—1947–1964**

Marvin Jones, as he was known, was born on February 26, 1882, on a cotton farm near Valley View, Cooke County, Texas, the son of Horace King (1849–1926) and Theodocia (Hawkins) Jones (1856–1958), pioneers who had moved to Texas from Tennessee. They were the parents of six boys and five girls. Marvin was the fourth child. He taught himself to read, attended a rural school, and at 17 years of age was a teacher himself in a one-room schoolhouse. Working summers as a tenant farmer, as a cowboy, and as a salesman selling stereoscopes and slides to earn extra money, he received a teacher's certificate and a B.A. degree from John Denton College in 1902, and a Ph.B. degree in 1905 from Southwestern University, Georgetown, Texas. He then attended the law department of the University of Texas in Austin, received his LL.B. degree, and was admitted to the bar in 1907. He commenced his practice in Amarillo, Texas, and was associated with Attorney Leonidas C. Barrett.

In 1913 Marvin Jones was appointed chairman of the Board of Legal Examiners of the Seventh Supreme Judicial District of Texas. He was an active country lawyer, traveling the circuit throughout the Texas Panhandle. Only eight years after he had "hung out his shingle" in Amarillo, he was, in 1916, elected to the 65th Congress as a Democrat from the 13th Texas Congressional District. This was one of the largest districts in the nation, comprising 63 counties at that time. An effective public speaker he vigorously canvassed the district in a Model-T Ford, traveling 30,000 miles to defeat the incumbent, John H. Stephens, who had represented the district for 20 years. Marvin Jones served 12 terms in Congress, a total of 24 years, until his resignation in 1940. His first vote in Congress was for the declaration of war on Germany in World War I and, as members of Congress were then permitted to do, he served in the Army in 1918 as a private in Company A, 308th Battalion of the Tank Corps. The war ended before he could serve abroad.

Because of his ability and long, secure tenure in the House, Marvin Jones rose to a position of power and leadership. When

*Chief Justice, 1947–1948; changed to Chief Judge, June 25, 1948, ch. 646, 62 Stat. 898.

his party gained a majority in the House in 1931, he became chairman of the House Committee on Agriculture, and served in that capacity from December 30, 1931, to November 20, 1940. From time to time he was considered for the position of Speaker, but deferred to his friend, Sam Rayburn of Texas, who became Speaker.

An expert in agricultural matters, Marvin Jones led the legislative efforts of President Franklin D. Roosevelt to rebuild the depression-shattered agricultural economy of the nation. He was directly responsible for numerous public laws, including the Agriculture Adjustment Acts of 1933 and 1938, the Emergency Farm Mortgage Refinancing Act of 1933, the Farm Credit Administration Act of 1933, the Cattle Purchase Act, the Resettlement Act, the Soil Conservation and Rebuilding Act, the Commodity Exchange Act, the Tenant Home Purchase Act, the Jones-Costigan Sugar Act, the Marketing Agreements Act for Perishable Commodities, and others. Farm subsidies and food stamps were also expanded under his leadership. Presidents of the United States presented him with 13 pens that had been used to sign into law legislation which had been sponsored by him.

On April 9, 1940, his friend, President Franklin D. Roosevelt, nominated Marvin Jones to be an associate judge of the Court of Claims, succeeding Judge Thomas S. Williams, deceased. He was confirmed by the Senate on the following day and took his oath of office on November 20, 1940. After Senate confirmation, the President had second thoughts and asked him to run for another term in Congress because he could see need for his legislative skills and leadership during the approaching war. After some hesitation and initial agreement to run again, Marvin Jones decided to become a judge. However, the President still had his assistance.

On January 15, 1943, during World War II, Judge Jones took a leave of absence from his judicial duties, as judges were permitted to do at that time, and at the President's request, served until June 29, 1943, as adviser and assistant to Justice James F. Byrnes, Director of Economic Stabilization. He was the American member of the Combined Food Board, the Anglo-American body, and was also president of the United Nations Conference on Food and Agriculture which held its conference in Hot Springs, Virginia, from May 18 to June 3, 1943. This conference was attended by representatives from 44 countries. He was a member of the President's War Mobilization Committee and served as the U. S. War Food Administrator from June 29, 1943, to July 1, 1945.

After serving as War Food Administrator, Marvin Jones resumed his judicial duties, and on July 10, 1947, he took his oath of office as the ninth Chief Justice of the Court of Claims, upon President Harry S. Truman's nomination, succeeding Chief Justice Whaley, retired. The vacancy of associate judge, thus created, was in turn filled by President Truman's appointment of Evan Howell, a Republican congressman from Illinois. By the Act of June 25, 1948, ch. 646, 62 Stat. 898, Congress abolished the title of chief justice for all federal courts, except the Supreme Court, thus changing the Act of March 3, 1863, ch. 92, 12 Stat. 765, which first authorized a Chief Justice for the Court of Claims. The new title given to the position was that of Chief Judge.

Chief Judge Jones continued in judicial service until his retirement on July 14, 1964. He was then 82 years of age but still in good health. Even after retirement he continued in judicial service as a senior judge with the Court of Claims and other federal courts and as a special master for the Supreme Court in the Mississippi-Louisiana boundary dispute. Judge Jones maintained an office and staff at the Court of Claims until his death on March 4, 1976, at 94 years of age, in Amarillo, where he is buried in Llano Cemetery.

In the last year of his life his health declined rapidly following a fall on his walk from the courthouse to his residence at the University Club. Judge Jones was married briefly as a young man. He had no children. He was survived by a sister, Mrs. Jeff M. Neely of Amarillo, and a brother, Herbert K. Jones of Lubbock, Texas. Chief Judge Jones was of hardy, pioneer stock. His mother lived to 102 years of age. He was a staunch Democrat of somewhat conservative views which were not always in complete sympathy with the liberal views of his party, but he was deeply loyal to the party because of the honors it had given him. He was a Methodist, a member of the American Legion, a Mason, a Woodman, an Elk, and a member of the American Bar Association. His congressional service was marked by his compassion for the small farmer. He was a trusted adviser to President Roosevelt. In 1959 he was named Man of the Year by the Federal Club of Washington, D.C., and received an honorary Order of the Coif from George Washington University in 1961, the Distinguished Alumnus Award from Southwest University in 1965, and the Sugar-Man-of-the-Year Award by the American Sugar Industry in 1966. He enjoyed the distinction of having served in high-level positions in all three branches of the Federal Government.

Chief Judge Jones was a mild-mannered Texan of pleasing personality. He was a good public speaker and had a great fund of stories to illustrate his points. He loved to fish, kept the motor for his boat in the courthouse basement, and on weekends he and Speaker Rayburn would drive to a private lake to enjoy their favorite recreation. Judge Jones was wont to say, "Among fishermen I am known as a great lawyer and among lawyers I am known as a great fisherman."

One of the greatest achievements of Judge Jones was to bring his influence to bear in Congress to obtain authorization for a much-needed new courthouse for the Court of Claims. He took senior status before moving into the new building but did maintain chambers there until his death. It was a matter of great personal pride, and he was delighted, that his longtime Texas friend, Wilson Cowen, Chief Commissioner of the Trial Division of the Court of Claims, was able to succeed him as Chief Judge. This, too, was accomplished through his great influence with President Lyndon B. Johnson, who never made a move concerning the court without first asking, "What does Marvin think of it?"

Lake Marvin in the Panhandle area near Canadian, Texas, is named for him. Judge Jones published his memoirs in 1973 and a collection of his more interesting opinions in 1964, as well as numerous food and farm articles while in Congress and in the War Food Administration. He had a unique style of writing, and common sense was the hallmark of his decisions. As Chief Judge he was an administrator who believed that people did their best work if trusted and not put under too many restrictions. His policy worked effectively. Although extremely cautious before committing himself to a course of action, he was interested in any progressive idea for improvement in the administration of justice. Under his administration, several innovations were made, of which a complete revision of the Court of Claims Rules was perhaps the most significant.

On June 11, 1964, a committee of friends sponsored a dinner in honor of the retiring Chief Judge and his colleague, Judge Samuel E. Whitaker. The affair, which was held at a leading Washington, D.C., hotel, was attended by hundreds. Chief Justice Earl Warren spoke in tribute to each retiring judge, as did Justice Stanley F. Reed (Ret.), Justice Tom C. Clark, and other officials in Government. Chief Judge Jones was further honored on October 22, 1968, by the presentation of his oil portrait to the court by friends and members of the bar. His service in Congress is memorialized by his portrait in the hearing room of the House Committee on Agriculture. The latter portrait was presented at a ceremony on June 27, 1952, attended by members of the com-

mittee, the Speaker, the senators from Texas, and many others. The junior senator from Texas, the Honorable Lyndon Baines Johnson, in his speech on that occasion said, in part:

> We trust you, we admire you, we respect you, we love you, we honor you today, and I know of no better way to conclude my brief statement than to repeat the statement that one of the great women I know made to me this morning before I left home. She said, "I would say about Marvin Jones: he is the type of man that every mother would want her boy to be."

The final proceeding was on June 9, 1976, when, at a special session of the court, a memorial service was held in honor of the departed Chief Judge. The principal speakers were old friends from Texas, Chief Judge Wilson Cowen, Justice Tom C. Clark (Ret.), and the chairman of the House Committee on Appropriations, the Honorable George Mahon. General Thomas H. King (Ret.), chairman of the Court of Claims Committee of the District of Columbia Bar Association, presented a commendatory resolution in the name of the association.

References: U.S. COURT OF CLAIMS REPORTS, Vols. 122, 166, 167, 185, 210 (537 F. 2d); BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS (1774–1971); CONGRESSIONAL DIRECTORY, 94th Cong., 1st Sess. (1975); WHO'S WHO IN AMERICA, Vol. 1 (1974–1975); WHO'S WHO IN THE NATION'S CAPITAL at 209 (1923–1924); CURRENT BIOGRAPHY at 356 (1943); Amarillo Globe-Times, Feb. 13, 1976, at 37; Wash. (D.C.) Star, Mar. 5, 1976, at B–4; Wash. (D.C.) Post, Mar. 6, 1976, at D–4; MARVIN JONES MEMOIRS (1973); SELECTED OPINIONS OF MARVIN JONES—SHOULD UNCLE SAM PAY, WHEN AND WHY? (1964); Bicentennial Committee Biographical Questionnaire, Judicial Conference of the United States (1976).

Joseph Warren Madden

Joseph Warren Madden

PENNSYLVANIA

36th Judge—1941–1961

J. Warren Madden was born on January 17, 1890, in Damascus, Stephenson County, Illinois, the son of William J. and Elizabeth Dickey (Murdaugh) Madden. The future judge attended a country school and the high school at Freeport, Illinois. He continued his education at the Northern State Normal School at DeKalb, at the University of Illinois where he received his B.A. degree in 1911, and at the University of Chicago where he received his J.D. degree in 1914. He was admitted to the Illinois bar that same year, and subsequently to the Ohio bar in 1918, the West Virginia bar in 1922, and the Pennsylvania bar in 1927. On July 16, 1913, J. Warren Madden was married to Margaret Bell Liddell of McAlester, Oklahoma, and they were the parents of five children: Mary Esther (Madden) Persinger (b. 1914), a lawyer; Lt. Joseph Warren, Jr. (b. 1915), a lawyer and an aviator who was killed in the military service in 1943; Capt. Robert Liddell (b. 1917), an investor; Margaret Elizabeth (Madden) Meyer (b. 1920), a social worker; and Murdaugh Stuart, a lawyer in Washington, D.C.

Much of Judge Madden's professional career was as a professor of law. He taught at the University of Oklahoma from 1914 to 1916, and was in private practice in Rockford, Illinois, in 1916 and 1917. This was followed by professorships at Ohio State University, Columbus, Ohio, for the period 1917 to 1921, West Virginia University from 1921 to 1927 where he was also dean of the law school, and the University of Pittsburgh, Pennsylvania, after 1927. During these years he served as a visiting professor at summer sessions at the law schools of the Universities of Chicago, North Carolina, Cornell, Stanford, Yale, and Vanderbilt. In the summer of 1920 he worked as a special assistant to the Attorney General in Washington, D.C. He also wrote extensively in the fields of property law and domestic relations. Among his publications were A TREATISE ON THE LAW OF DOMESTIC RELATIONS AND PERSONS (1931) and an INTRODUCTION TO REAL PROPERTY (rev. ed. 1934), co-editor of CASES ON PERSONS AND DOMESTIC RELATIONS INCLUDING MARRIAGE AND DIVORCE (1940), and co-editor of CASES ON RIGHTS IN LAND (1934). He was also an adviser to the reporters in PROPERTY

AND TORTS RESTATEMENTS, American Law Institute. In 1933 and 1934 he was a member of the Governor's Commission on Private Policing in Industry in Pennsylvania.

Professor Madden's first political appointment of consequence was as Chairman of the National Labor Relations Board from 1935 to 1940. In this position he succeeded Lloyd K. Garrison, dean of the University of Wisconsin Law School, and Francis Biddle, later the Attorney General, each of whom served only briefly. His friend, Justice William O. Douglas, wrote about this appointment by President Franklin D. Roosevelt, as follows:

> * * * [H]is arrival at NLRB was like being dipped in hot oil.
>
> Labor problems were the hottest public issues of the day. Unionists were denounced as communists. The feelings of management ran very high, and so did the emotions of labor. * * *
>
> * * * [D]uring most of that time [as chairman] he was the most despised man in Washington. He always stood firm and met the charges fearlessly. He was denounced more severely than any federal officer in my time, yet he did yeoman service in honest, hard-headed administration, as a result of which both Hugo Black and I told FDR he should name Madden to the [Supreme] Court.
>
> FDR did not name him only because * * * he thought Madden would never be confirmed because of the hostility his job had engendered. * * *

Indeed, the President concluded that the professor could not be reconfirmed for a new appointment as Chairman of the National Labor Relations Board, and appointed him instead to the U. S. Court of Claims, where he took his oath of office on January 8, 1941, succeeding Judge William R. Green, retired. Judge Madden served with distinction on the court until his retirement on August 15, 1961, when he was succeeded on the bench by Oscar H. Davis of New York.

During World War II Judge Madden took a leave of absence from the court to serve first as associate director of the legal division, later as director of the legal division, and as adviser to the U. S. Military Governor, Office of Military Government for Germany. President Truman awarded him the Medal of Freedom for his service in Germany. He returned to the Court of Claims in July 1946.

Upon his retirement in 1961 Judge Madden returned to the teaching of law as a professor at Hastings Law School, San Francisco, and sat with regularity as a senior federal judge on

the U. S. Court of Appeals for the Ninth Circuit, also in San Francisco. He wrote almost 100 opinions for the Ninth Circuit. He continued these activities until shortly before he died in his sleep on February 17, 1972, in San Francisco at the age of 82. He is buried in Falls Church, Virginia.

Judge Madden was a member of the American Law Institute, Delta Upsilon, Phi Alpha Delta, Order of the Coif, and the Cosmos Club in Washington. He was a Democrat in politics and a strong New Dealer. He was called a socialist and worse by his political enemies. But, he was a strong believer in private property, dealt in real estate as a hobby, was very careful with his money, and though liberal in his own views had a high degree of tolerance for the political beliefs of others.

Judge Madden was informal in dress and demeanor. For a long time he had annual parties for his colleagues and the court personnel at his home in Falls Church, Virginia, or at his Virginia farm. He would take them on hikes through the woods, pointing out and naming the trees. He would gather his friends about while he played a guitar and sang old songs like the "Blue Tail Fly." Judge Madden was a rapid worker. He wrote all of his opinions in longhand on yellow legal pads. He was interested in doing justice as he saw it without regard for any legal technicalities that could be avoided. He was known as a judge who was always current in his work. Judge Madden was affectionately known around the courthouse by the nickname "Socrates" or "Old Soc." He said that it was because he suspected some employees or colleagues wanted him to take a cup of hemlock, but it was truly out of respect for his scholarship and a term of endearment.

On October 13, 1972, the court held a memorial ceremony for Judge Madden in the main courtroom, which was filled with the late judge's friends and family. Chief Judge Cowen first recognized Commissioner Margaret Pierce of the Indian Claims Commission. Mrs. Pierce had been a law clerk to Judge Madden. In a touching and eloquent tribute to her former employer, she spoke of his love for the underdog, his disposition not to suffer fools gladly nor waste his time on lost causes, his homespun manner, his ability to laugh at himself, his complete absence of self-righteousness, his scholarship, his fluency in several languages, and his belief that it is a privilege to serve one's Government and that such service should be rendered with honor. She was followed by Ralph Barney, the chief of the Indian Claims Section of the Land and Natural Resources Division, Department of Justice, who spoke for the Department. The Honorable Francis M. Shea, a former Assistant Attorney General and close friend

of the judge, spoke of his service with the NLRB and of *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962). Judge Madden had sat, by designation, as a judge on the U. S. Court of Appeals for the Second Circuit in the *Glidden* case. The petitioner before the Supreme Court challenged his right to sit on the ground that the Court of Claims was not a court organized under article III of the Constitution. Mr. Shea wrote a brief for the Court of Claims and participated in the oral argument. His views were sustained by the Supreme Court which declared the Court of Claims to be a constitutional court, reversing the holding in *Williams* v. *United States*, 289 U.S. 553 (1933). Judge Madden was justly proud that in this way he contributed to the enhancement of the status of the court he loved and served faithfully for over 20 years. Judge Madden's oldest and closest friend was Senior Judge Charles Fahy of the Circuit Court of Appeals for the District of Columbia. He had been chief counsel of the NLRB under Chairman Madden and served with him in Occupied Germany. His moving tribute was ordered published with the others in the REPORTS of the court. Judge Madden's memory is further perpetuated by a lifelike oil portrait presented to the court by his family on June 9, 1961. Chief Judge Marvin Jones, who had served with Judge Madden on the court throughout his tenure, accepted the portrait in the name of the court, paying him a deserved tribute, which is also set forth in the REPORTS.

References: U.S. COURT OF CLAIMS REPORTS, Vols. 155, 199 (465 F. 2d); WHO WAS WHO, Vol. V (1969–1973); CONGRESSIONAL DIRECTORY, 80th Cong., 2d Sess. (1948); W. O. DOUGLAS, GO EAST, YOUNG MAN at 371–372; Bicentennial Committee Biographical Questionnaire, Judicial Conference of the United States, prepared by his son, Murdaugh S. Madden (1976).

(George) Evan Howell

(George) Evan Howell

ILLINOIS

37th Judge—1947–1953

Evan Howell was born in Marion, Williamson County, Illinois, on September 21, 1905, the son of Ernest Truman and Jo Ella (Rainey) Howell and brother to twins William and Kathleen (b. September 6, 1911). He attended the public schools at Villa Grove, Douglas County, Illinois, and was valedictorian of his high school graduating class in 1923. In 1927 he received his B.S. degree from the University of Illinois, College of Commerce, and his LL.B. degree (now J.D.) in 1930 from the University of Illinois College of Law where he was a member of the Phi Delta Phi legal fraternity and the university band. He taught school at the Harvard Community High School, McHenry County, Illinois, and while obtaining his law degree was an instructor in the College of Commerce.

Upon admission to the Illinois bar in 1930, Evan Howell began the practice of law in the offices of Cornelius J. Doyle of the firm of Doyle, Sampson & Griffin. In the years 1933 to 1941 he was a special master in chancery by appointment of the United States district court in Springfield and referee in bankruptcy during the period 1936 to 1941. He was an active member of the Sangamon County, Illinois, Bar Association and served as president of the Springfield Urban League, the University Club, and the American Business Club. He is a member and Past Exalted Ruler, B.P.O.E., a Jester, Shriner, and an honorary 33d degree Mason. He was also active in the Abraham Lincoln Council of Boy Scouts of America, the Community Welfare Fund, the YMCA, and the Officers' Reserve Corps.

Evan Howell was elected as the first president of the Young Republican organization of Illinois in 1933 and was secretary of the Illinois delegation to the Republican Grass Roots Convention held in Springfield in 1936. In 1940 he was elected as a Republican member to the 77th and three succeeding Congresses, serving from January 3, 1941, to his resignation from the 80th Congress on October 5, 1947. On the following day he took his oath of office and became an associate judge of the U. S. Court of Claims by the appointment of President Harry S. Truman, whose nomination of him on July 18, 1947, was confirmed by the Senate on July 23, 1947. He was commissioned on July 30, 1947,

and succeeded to the vacancy of Judge Marvin Jones of Texas, who was named Chief Justice (changed to Chief Judge in 1948) of the court by the President. Judge Howell served six years on the bench until his resignation on September 30, 1953. On October 9, 1953, Chief Judge Jones announced with regret, in open court, the resignation of Judge Howell, stating that he had integrity, loyalty, ability, and an unusual personality; that these qualities had made the relations between Judge Howell and the other members of the bench most pleasant; and that in his new field of endeavor the court wished him many happy and useful years. He was succeeded on the bench by Don N. Laramore of Indiana.

Judge Howell maintained his home in Washington, D.C., but returned to Illinois upon the appointment, by Gov. William Stratton, to be the first chairman of the newly created Illinois State Toll Highway Authority. Upon completion of his assignment he returned to Washington, D.C., where he engaged in the private practice of law.

As a member of Congress Evan Howell served on the House Committee on Small Business and the Committee on Interstate and Foreign Commerce. The latter committee had legislative jurisdiction over all the federal regulatory commissions. He was a member of the subcommittees on transportation, communications, public health, and civil aviation and was the author of legislation which established civilian airports in Alaska before it was admitted to statehood. Always keenly interested in civil aviation, Judge Howell later served as consultant and attorney-adviser to the Administrator of the Federal Aviation Administration until his retirement in 1975.

In the Washington community Judge Howell continued his interest in civic affairs, serving as president of the Metropolitan Police Boys' Club, as a trustee of George Washington University, and as president of the Washington chapter of the University of Illinois Alumni and of the Illinois Society. He is a member of the Chevy Chase and Burning Tree Clubs, an honorary life member of the District of Columbia and Sangamon County, Illinois, Bar Associations, and a member of the Methodist Church.

On May 1, 1937, Evan Howell was married to Kathryn Margaret Sellers of Springfield, Illinois, and they are the parents of five children: Marilyn (Mrs. Maynard Phillips, b. February 22, 1938), Joella (Mrs. Robin Prince, b. April 22, 1942), William Evan (b. August 26, 1944), John Ernest (b. February 20, 1948), and Kathryn May (b. January 1, 1951). The Howells have seven grandchildren.

Judge and Mrs. Howell reside in Montgomery County, Maryland.

References: U.S. COURT OF CLAIMS REPORTS, Vol. 126; BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS (1774–1971); WHO'S WHO IN AMERICA, Vol. 31 (1960–1961); CONGRESSIONAL DIRECTORY, 77th Cong., 2d Sess. at 29 (1942) and 80th Cong., 2d Sess. (1948); E. Howell, *Court of Claims of the United States*, 54 PA. BAR ASS'N Q. 59 (1949); Bicentennial Committee Biographical Questionnaire, Judicial Conference of the United States (1976).

Don Nelson Laramore

Don Nelson Laramore

INDIANA

38th Judge—1954–1972

Don N. Laramore was born on December 22, 1906, in Hamlet, Starke County, Indiana, the son of Louis Nelson (d. 1921), a livestock buyer, and Pearl (Stephenson) Laramore (d. 1967), a librarian. He has one brother and two sisters: Robert K. (b. July 1918), a procurement officer in the United States Air Force; Dorothy (Laramore) Bell (b. June 1904); and Marjorie (Laramore) Sides (b. August 1912). His paternal grandparents were Andrew Jackson and Elizabeth (Hill) Laramore.

Don Laramore was educated in the public schools of Hamlet and Knox, Indiana, in the years 1912 to 1924, and thereafter attended Gregg College in Chicago for a year where he studied court reporting. He was the official reporter for the Starke County circuit court from 1925 to 1936. During the period 1926 to 1928 he attended three summer sessions of law at the University of Chicago and in 1928 attended the Indiana School of Law in Indianapolis. While a court reporter he also studied law in the office of Judge William C. Pentecost in Knox, Starke County, Indiana. On April 18, 1931, he was admitted to practice law in the State of Indiana.

In 1936 he discontinued court reporting and until 1942 worked in the claims departments of the Nickel Plate, Pennsylvania, and New York Central Railroads. He was a judge pro tempore of the 44th Judicial Circuit, Starke County, from 1942 to 1944, and in November 1944 he was elected to that office on the Republican ticket, and again in November 1950.

On March 17, 1954, Judge Laramore was commissioned by President Dwight D. Eisenhower to be an associate judge of the United States Court of Claims, succeeding Judge Evan Howell, resigned. He took his oath of office on May 1, 1954, and after serving over 17 years on the Court of Claims bench he took status as a senior judge on January 17, 1972. Thereafter, he continued to sit at some of the sessions of the court and by designation on various United States circuit courts of appeals. Judge Laramore was succeeded on the bench by Robert L. Kunzig of Pennsylvania.

The occasion of Judge Laramore's retirement was marked on March 15, 1972, by a testimonial dinner at the Mayflower Hotel,

Washington, D.C., sponsored by the American and Federal Bar Associations and the Bar Association of the District of Columbia. Among the several speakers on that occasion was Chief Judge Wilson Cowen who remarked upon Judge Laramore's remarkable memory for the precedents of the court, of his special interest in tax cases, and of his contribution to the work of the court which was aided by his extensive experience as a trial judge.

Judge Laramore is a member of the American Bar Association, the American Judicature Society, the National Lawyers Club, and the Gamma Eta Gamma legal fraternity, and is a Mason and a Shriner.

On December 29, 1938, he was married in Chicago, Illinois, to Charlotte Mary Schminke (b. May 31, 1913), the daughter of George Walter and Charlotte (Meyer) Schminke. Judge and Mrs. Laramore are the parents of one daughter, Prudence Ann (b. July 25, 1945), who received her master's degree in education and is now teaching.

In retirement, Judge and Mrs. Laramore reside in Sumner, Maryland, a suburb of Washington, D.C., and spend their winters in Florida where the judge enjoys fishing, golfing, and chess, his principal hobbies.

References: WHO'S WHO IN AMERICA, Vol. 2 (1972–1973); CONGRESSIONAL DIRECTORY, 94th Cong., 2d Sess. (1976); D. N. Laramore, *United States Court of Claims*, 30 OHIO BAR 854 (1957); Bicentennial Committee Biographical Questionnaire, Judicial Conference of the United States (1976).

James Randall Durfee

James Randall Durfee

WISCONSIN

39th Judge—1960–1972

James R. Durfee was born in Oshkosh, Wisconsin, on November 3, 1897, the son of Thomas Henry and Mary (Rossiter) Durfee. In addition to James R., they were the parents of Rossiter C. (1890–1952), a civil engineer, Thomas H. (d. 1975), also a civil engineer, Flora K. (Durfee) McWilliam (1894–1936), and Grace A. (Durfee) Miller (b. 1900). The Durfees were of English, Scotch, and Irish Catholic extraction, and the first ancestor to come to America was Thomas Durfee, who arrived from England in 1664 and settled in Tiverton, Rhode Island.

James R. Durfee attended public schools and graduated from the Huron, South Dakota, high school. He attended Huron College for three years and then entered Marquette University School of Law in 1923. He graduated from Marquette in 1926 with an LL.B. degree, was admitted to the Wisconsin bar in that year, and began the practice of law in Antigo, Wisconsin. He was a member of the firm of White & Durfee in 1927 and 1928 and of Durfee & Breihan from 1929 to 1935. Thereafter, he practiced independently until 1951.

From 1928 to 1932 James R. Durfee was district attorney of Langlade County, Wisconsin, and served as court commissioner of the 10th Judicial Circuit of his state during the period 1934 to 1950. In 1951 he was appointed by Gov. Walter Kohler as a member of the Wisconsin State Public Service Commission and during 1953 and 1956 was its chairman. On April 13, 1956, he was appointed by President Dwight D. Eisenhower as Chairman of the Civil Aeronautics Board for a term ending December 1960.

On January 11, 1960, James R. Durfee was nominated by President Dwight D. Eisenhower to be a judge of the Court of Claims to succeed Judge Benjamin H. Littleton, retired. The appointment was confirmed by the Senate on April 20, 1960, and his commission is dated April 22, 1960. Judge Durfee took his oath of office and entered upon his duties at the court on May 2, 1960. He retired from active judicial service on January 6, 1972, after almost 12 years of service, and became a senior judge of the court. Judge Durfee was succeeded on the bench by Shiro Kashiwa of Hawaii. As a senior judge, Judge Durfee continued to sit with regularity to help the court with its cases, and by designation of the Chief

Justice he also sat on some of the United States circuit courts of appeals. The judge was honored at a reception and testimonial dinner on March 15, 1972, sponsored by representatives of the American Bar Association, Federal Bar Association, and the Bar Association of the District of Columbia. A large gathering was present at this affair in the Mayflower Hotel in Washington, and it was attended by his colleagues, friends of the bar, and friends from the Senate and House of Representatives, as well as by a delegation from Wisconsin.

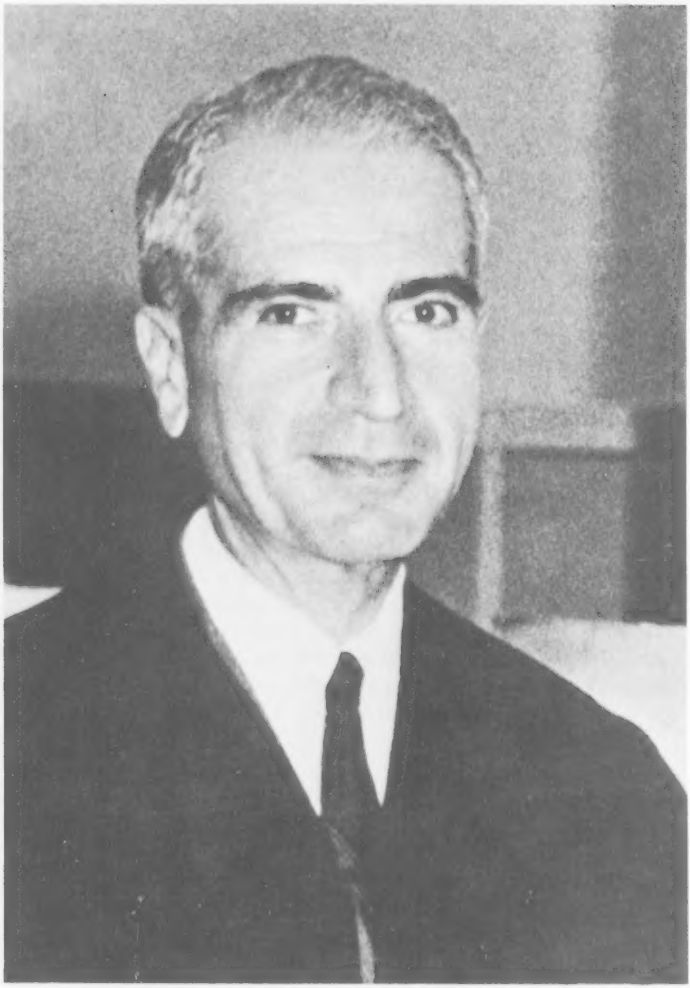
Judge Durfee was honored by the Marquette University School of Law with its Man-of-the-Year Award in 1958 and by its Distinguished Award in 1972. He received the university's Alumni Award for Meritorious Service in 1957.

Judge Durfee enlisted in the Army in April 1917 and was discharged in June 1919. He served with the 127th Machine Gun Battalion, 34th Division, in this country and with the AEF in France. During the Second World War he served as a major in the Wisconsin State Guard from 1941 to 1945. In 1943 and 1944 he was state commander of the American Legion in Wisconsin, as well as a member of its national legislative committee.

Judge Durfee has been a member of the National Association of Railroad and Utilities Commissioners and the National Aviation Association, is now an honorary member of the latter, and has been the contributor of numerous articles which have been published on public utilities regulation. He is a member of the American, Federal, and Wisconsin Bar Associations, the Delta Theta Phi legal fraternity, and the American Legion.

On July 17, 1933, Judge Durfee was married to Mona B. Burns, a public school teacher and daughter of John L. Burns of Antigo, Wisconsin. Judge and Mrs. Durfee are the parents of Mary (Mrs. David Clarke) of Concord, Massachusetts, James R. Durfee, Jr., of Oswego, Oregon, and John Thomas Durfee of Washington, D.C., who is a lawyer with the Civil Aeronautics Board. They have five grandchildren.

References: CONGRESSIONAL DIRECTORY, 94th Cong., 2d Sess. (1976); WHO'S WHO IN AMERICA, Vol. 1 (1976–1977); I [Eye] NATIONAL CYCLOPEDIA OF AMERICAN BIOGRAPHY 124; Bicentennial Committee Biographical Questionnaire, Judicial Conference of the United States (1976).



Oscar Hirsh Davis

Oscar Hirsh Davis

NEW YORK

40th Judge—1962–____

Oscar H. Davis was born in New York City on February 27, 1914, the son of Jacob (1877–1942) and Minnie (Robison) Davis (1879–1962). His father arrived in New York from Europe in 1904 and was naturalized in 1914. His mother arrived in 1884. Jacob Davis (Davisky) left his home in Czarist Russia, in the area of Lithuania, as a young man of about 16 years of age, and traveled about Europe looking for better opportunities. He lived successively in Warsaw, Poland, Berlin, Germany, Stockholm and Malmo, Sweden, and Paris, France, where he attended school, and came to the United States from England. In this country Jacob was a small manufacturer of artificial silk and dealt in real estate and insurance. Jacob and Minnie Davis were the parents of three sons: Leo (1910–1917); Lawrence (b. 1917), a medical doctor and professor of radiology at the University of Louisville, Kentucky; and Oscar.

Oscar H. Davis was educated in the public schools of Mount Vernon, New York. He attended Harvard College from which he was graduated in 1934 with an A.B. degree. He graduated summa cum laude and Phi Beta Kappa. He then attended Columbia University School of Law in New York City from which he received his LL.B. degree (later changed to J.D.) in 1937. In law school he was a Kent scholar in his first and third years and was on the law review staff, serving as the decisions editor. He became a member of the New York bar in 1938.

The future United States judge worked at miscellaneous jobs to help pay his way through Harvard. As a law student he worked in the summer as a clerk-messenger and a research assistant. In September 1937 he became an associate for two years with Chadbourne, Wallace, Parke & Whiteside, New York City, a firm in the general practice of law. In 1939 he came to Washington, D.C., to a position in the Supreme Court Section of the Claims Division (now the Appellate Section of the Civil Division), U. S. Department of Justice, and worked chiefly on Supreme Court briefs. He was admitted to the Supreme Court bar and the bar of the Court of Claims in 1941. He continued to work at the Department of Justice until he entered the Army in July 1942 where he served until May 1946, reaching the rank of captain in the Air Corps. In the military service he was involved mainly in legal work,

including courts-martial problems, procurement, and legal assistance. He received the Army Commendation Medal for his work on atomic energy legislation for the War Department during World War II.

Returning to the Department of Justice after the war, Oscar Davis supervised, revised, and wrote briefs and argued Government cases primarily in the Supreme Court, but to some extent in other courts. In September 1950 he became Second Assistant to the Solicitor General (now called Deputy Solicitor General) and served in that post until June 1954. From July 1954 to April 1962 he was First Assistant to the Solicitor General (now called the Deputy Solicitor General). Twice he was Acting Solicitor General for brief periods in 1953 and 1956. He personally argued over 50 cases before the Supreme Court of the United States.

On January 31, 1962, Oscar Davis was nominated to be a judge of the U. S. Court of Claims by President John F. Kennedy, and this nomination was confirmed on April 11, 1962. His commission is dated the following day, and he took his oath of office on April 26, 1962, succeeding Judge J. Warren Madden, retired.

Judge Davis is the author of *The Federal Lawyer*, published in the March 1959 issue of Columbia Law School Alumni Bulletin, volume III; a book review of GOVERNMENT LITIGATION: CASES AND NOTES by Schwartz & Jacoby, 28 D.C.B.J. (1961); and a review of HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES by Jayson, 66 Colum. L. Rev. 619 (1966). Judge Davis is a member of the American Law Institute and has served on its advisory committees on Restatement of Judgments and on the Division of Jurisdiction Study. He is a member of the American Bar Association, the Federal Bar Association, the New York County Lawyers Association, and the New York State Bar Association.

Judge Davis has never married. He is wedded to the law. He has traveled extensively in Europe, is known for his pleasure in exercise by walking, and his hobby is work.

References: CONGRESSIONAL DIRECTORY, 94th Cong., 2d Sess. (1976); WHO'S WHO IN AMERICA, Vol. 1 (1976–1977); Bicentennial Committee Biographical Questionnaire, Judicial Conference of the United States (1976).

Wilson Cowen

Wilson Cowen

MARYLAND (TEXAS)

41st Judge
*10th Chief Judge—1964–____**

Wilson Cowen was born on December 20, 1905, in the village of Norse, near Clifton, Bosque County, Texas, the son of John Rentz (1882–1965) and Florence Juno (McFadden) Cowen (1886–1964), and had two brothers, Joseph N. (b. 1910) and Hardy C. (1915–1976). His only sister, Corinne (Mrs. Jeff Richards, b. April 1908), died in April 1975. His father was a retail merchant and later served several terms as county clerk of Bosque County, Texas.

Wilson Cowen started to work as a lad of 14 and, until he graduated from Clifton High School in 1923, he held miscellaneous summer jobs as a farm laborer, shoe shine boy, soda fountain attendant, and grocery delivery boy. As a representative of his high school, he twice won first place in declamation, and was three times a member of the winning debating team in the annual county interscholastic league contests. He was president of his class during each of his four high school years, ranked second in his graduating class, and was awarded a scholarship to the University of Texas. While attending the university at Austin, he worked at the usual jobs available to students to help pay his college expenses. During the summers he was a counselor for a YMCA camp. In his freshman year he won the first prize, a gold watch, as the best speaker in the university intersociety debating contest, and was later a member of the varsity debating and wrestling teams. At the law school of the University of Texas, from which he received his LL.B. degree in 1928, he was a contributor to the law review, was a member of the moot court society, and was the class speaker at graduation. He was elected to membership in Alpha Phi Epsilon, an honorary public speaking fraternity, and to Delta Sigma Rho, an honorary debating fraternity. Later he became an honorary member of the Order of the Coif, George Washington University (1965), and of the Delta Theta Phi law fraternity (1967).

Admitted to the Texas bar in 1928, Wilson Cowen commenced the general practice of law at Dalhart, Texas, as an associate with the firm of Tatum & Strong. He was president of the Dallam County Bar Association for four years. In 1934 he was elected

*Retired March 1, 1977.

county judge of Dallam County on the Democratic ticket, and as a judge he sat on a court of record with jurisdiction of probate, juvenile, criminal misdemeanors, and small civil cases. He was also ex-officio chairman of the Board of County Commissioners, and as such was also the principal administrative officer of the county.

The Panhandle of Texas was hit hard by the economic depression of the 1930's, and its troubles were compounded by the severe drought in the Great Plains. Dallam County was in the heart of the Dust Bowl. The dust storms, which began in 1932, reached their height in 1935. They caused drastic financial losses and resulted in hardships and suffering by many people. Because of these circumstances, the young judge became involved in a number of local, state, and federal projects and programs that were undertaken to relieve the widespread human distress and to curb the devastating soil erosion in the area. His participation and experience in these activities led to his appointment in 1938 as Texas State Director of the Farm Security Administration, Department of Agriculture. In 1939 he became Associate Director of the agency's Rural Rehabilitation Division in Washington, D.C., and in 1940 was appointed Director of Region 12 of the FSA. In the latter position he had responsibility for the FSA programs in New Mexico and parts of Texas, Kansas, and Colorado. In 1942 he came to Washington, D.C., to accept the appointment as a commissioner (trial judge since 1972) of the United States Court of Claims. In September 1943 he was granted a leave of absence from the court to serve as Assistant War Food Administrator under Judge Marvin Jones, his mentor and close friend of many years. From July 1 to October 1, 1945, he was Special Assistant to the Secretary of Agriculture during the post-war reorganization of the Department. In October 1945 he returned to the court to continue his judicial duties as a trial commissioner and was appointed Chief Commissioner of the court's Trial Division in 1959. He was a member of the court's Committee on Rules since it was first organized in 1947 and was responsible for many innovations in the court's procedures, including the preparation of orders for the handling of special litigation and the drafting of forms and orders pertaining to discovery, depositions, and pretrial procedures. After Congress first appropriated funds for the new courthouse, which was dedicated on September 20, 1967, he was chairman of the court's Building Committee and acted as its representative in dealings with architects, officials of the Public Buildings Service, and other interested officials and persons.

On June 16, 1964, Wilson Cowen was nominated to be Chief Judge of the Court of Claims by President Lyndon B. Johnson,

to succeed Chief Judge Marvin Jones, retired. He was confirmed by the Senate on July 2, 1964, commissioned on July 8, and took his oath of office and assumed his duties on July 14, 1964. He was a legal resident of Bethesda, Maryland, at the time of his appointment to the court. Although appointed as the second Chief Judge of the court (a statutory title created in 1948, ch. 646, 62 Stat. 898), he was actually tenth in line of succession as chief judge or chief justice of the court. He was one of only three chief justices or chief judges who had not served as an associate judge prior to his appointment.

During his service in the court, beginning in 1942, Chief Judge Cowen participated in a position of leadership in the revision and modernization of the court's rules and in securing legislation which strengthened the court and broadened its jurisdiction. New laws enacted at his request include acts which: (1) increased the number of the court's judges from five to seven (the first enlargement since 1863) and authorized the court to sit in panels, 80 Stat. 139 (1966); (2) provided for the reference of private claims by either House of Congress to the Chief Commissioner, 80 Stat. 958 (1966); (3) authorized contract reporting of all court proceedings, 84 Stat. 298 (1970); (4) granted the court jurisdiction over contract suits against nonappropriated fund activities (military exchanges), 84 Stat. 449 (1970); (5) gave the court jurisdiction to redetermine excessive profits found by the Renegotiation Board, 85 Stat. 97 (1971); (6) authorized the court to recall retired trial judges, 86 Stat. 529 (1972); and (7) granted the court authority to remand matters to administrative and executive bodies and officials, and to implement its judgments by ordering restoration of officers and employees to office or position or placement in appropriate status, 86 Stat. 652 (1972). As a result of changes in the statutory law and in the rules of the court, the Court of Claims, during his tenure, became a two-division court and now combines in one tribunal the facilities and attributes of a trial and an appellate court. He is the representative of the court on the Judicial Conference of the United States and has served on its committees on Trial Practice & Technique and Judicial Improvements.

Chief Judge Cowen is a member of the Cosmos and National Lawyers Clubs, the Masons, the Texas Bar Association, the Federal Bar Association, and the American Bar Association. He has been a trustee and chairman of the Board of Trustees of the Landon School for Boys, Bethesda, Maryland. He is a member of the Presbyterian Church.

On April 18, 1930, Chief Judge Cowen married Florence Elizabeth Walker of Texas (b. July 10, 1908). Mrs. Cowen attended

Eastern Michigan University and was a primary school teacher for eight years. Judge and Mrs. Cowen are the parents of Dr. Wilson Walker Cowen (b. June 5, 1934), a graduate of Harvard University, and Director of the University Press, University of Virginia, Charlottesville, Virginia, and John Elwin Cowen (b. March 24, 1942), a graduate of Gallaudet College, and an editorial assistant, Federal Supply Service, General Services Administration. The Cowens have one grandchild, Charles Wilson.

References: WHO'S WHO IN AMERICA, Vol. 1 (1976–1977); CONGRESSIONAL DIRECTORY, 94th Cong., 2d Sess. (1976); Federal Bar News at 44 (Feb. 1967); Bicentennial Committee Biographical Questionnaire, Judicial Conference of the United States (1976).

Linton McGee Collins

Linton McGee Collins

DISTRICT OF COLUMBIA (GEORGIA)

42d Judge—1964–1972

Linton McGee Collins was born in Reidsville, Georgia, on June 21, 1902, the eldest child of Ernest Clyde (1880–1959) and Beulah Edna (Rogers) Collins (1879–1941). He had two brothers, Ernest Clyde, Jr. (1904–1975), and Earl Rogers (1906–1975). Linton Collins obtained his higher education at Mercer University from which he received his A.B. degree in 1921 and an M.A. degree in 1922. He also attended law school there. In 1955 he received an honorary LL.D. degree from Gallaudet College, Washington, D.C. He studied at the University of Paris in the summer of 1923 and at Columbia University, New York City, in 1924. During the latter year he was admitted to practice in Georgia and subsequently was admitted to the bars of Florida (1925) and the District of Columbia (1927).

Before beginning the practice of law, Linton Collins was an English teacher at Lanier High School, Macon, Georgia, from 1922 to 1924, and taught English and history at the high school in Columbia, South Carolina, during 1924 and 1925. He began the practice of law in Tampa, Florida, with the firm of Shackleford & Brown in 1925, but the following year moved to Miami and practiced under the firm name of Collins & Collins. For the two-year period 1930 to 1932 he returned to teaching and taught American government and political science at the University of Miami, Coral Gables, Florida.

In 1933 Linton Collins was employed as a personnel director and division administrator of the National Recovery Administration and continued in that position until 1935 when he was appointed First Assistant in the Office of the Deputy Attorney General and later as a Special Assistant to the Attorney General of the United States in whose office he served until 1944. From 1935 to 1938 he was also associated with the Prison Industries Reorganization Administration. He practiced law in Washington, D.C., in the years 1944 to 1946 with the firm of Kremer & Bingham and, thereafter until 1960, with Bingham, Collins, Porter & Kistler. From 1960 to 1964 he practiced under the firm designation of Collins, Robb, Porter & Kistler. His former partner, Roger Robb, became a judge of the United States Court of Appeals for the District of Columbia in 1969.

Linton Collins was active in civic and local political affairs wherever he lived. He was a member of the Dade County, Florida, Democratic executive committee from 1930 to 1934, secretary-treasurer of the Florida Democratic State Committee from 1932 to 1936, president of the Miami Junior Chamber of Commerce during 1927 and 1928, president of the Florida Junior Chamber of Commerce in 1930 and 1931, a director of the United States Junior Chamber of Commerce from 1931 to 1934, and a director of the Miami Chamber of Commerce from 1932 to 1933. In Washington, D.C., he was a member or officer, from 1944 until his death, of the board of Gallaudet College, the only college in the world for the deaf, and was its general counsel during most of that time. Judge Collins was very interested in work for the handicapped. He was also active in the International Rotary Club, the Washington Board of Trade, which he represented as counsel during the period 1959 to 1964, and in the United States Chamber of Commerce of which he was a national officer from 1950 to 1960. He was a member of the Columbia Country Club, the Metropolitan, National Lawyers, Palaver, and Cosmos Clubs, Phi Delta Theta, and the Chevy Chase Baptist Church. He had deep Christian convictions, was a close student of the Bible, and liked to discuss its passages and meaning with others who knew it well. He had committed to memory many passages of the Bible. He was very active in the international Christian leadership group and an active participant in the Christian men's prayer group in Washington. He was interested in music, gardening and art, and was a collector of antiques. He was an honorary life member of the Florida Bar Association, an inactive member of the Georgia bar, and an active member of the Inter-American, Federal, American, and District of Columbia Bar Associations, and of the American Judicature Society. In 1945 he was awarded the Congressional Selective Service Medal by President Harry S. Truman in recognition of his having handled all conscientious objector appeals in the nation during World War II under the Selective Service Act of 1940.

On September 8, 1964, Linton Collins was nominated by President Lyndon B. Johnson to be an associate judge of the Court of Claims, to succeed Judge Samuel E. Whitaker, retired, was confirmed by the Senate on September 17, and took his oath of office on October 1, 1964. He died suddenly and unexpectedly of heart failure at his home in Washington, D.C., on April 12, 1972, at 69 years of age. Marion T. Bennett of Maryland and Missouri succeeded him on the bench.

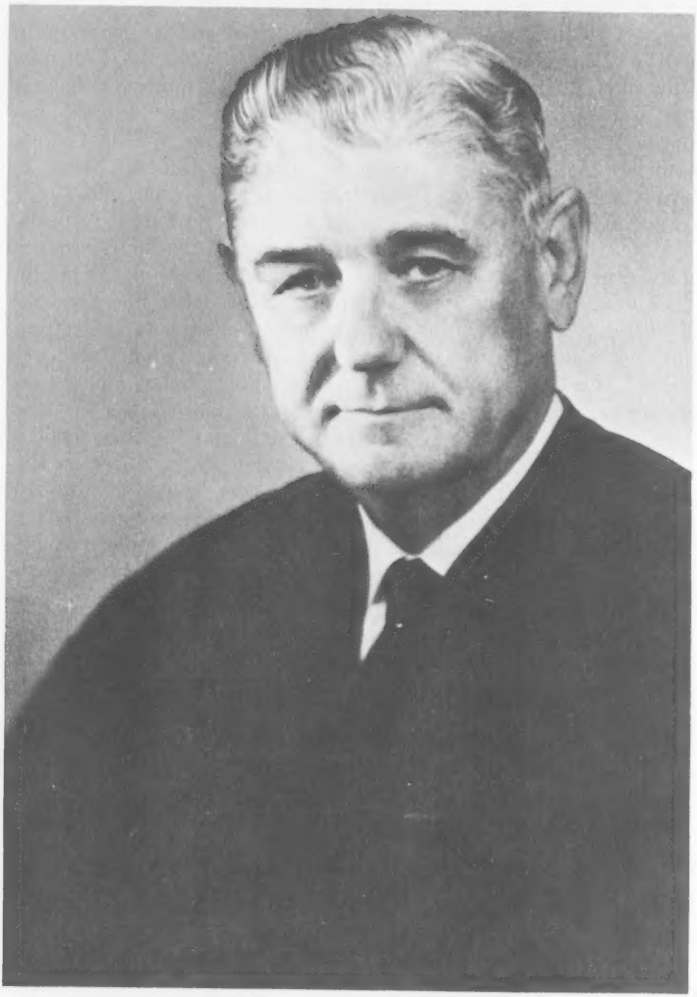
Judge Collins was survived by his wife, Josephine Staten (Hardman) Collins (b. 1910), and his daughter, Cynthia (Mrs.

Strother F. Randolph, b. 1945). Mrs. Collins' father was Dr. Lamartine G. Hardman who served as Governor of Georgia from 1927 to 1931. Judge and Mrs. Collins were married on January 30, 1934. She was a graduate of Shorter College, Rome, Georgia, and studied also at George Washington University in the Nation's Capital.

A memorial service in honor of Judge Collins was held at the Court of Claims on January 23, 1973. Present on that occasion, in addition to members of the Collins family, were Chief Justice Warren E. Burger, Justice Tom C. Clark (Ret.), numerous federal and local judges, members of Congress, and other friends. Remarks of tribute were delivered by Chief Judge Wilson Cowen, Attorney Ashley Sellers, Assistant Attorney General Scott P. Crampton, United States District Judge Oliver Gasch, and Judge Donald E. Lane of the U. S. Court of Customs and Patent Appeals, all close friends of long standing of the deceased. The active judges of the court and Senior Judge James R. Durfee were on the bench.

All of the speakers at the ceremony extolled the fine personal character of Judge Collins and his many services to the nation and to the communities in which he had lived. Judge Gasch expressed the sentiments of all in describing Judge Collins as "generous, gracious, tactful, wise and experienced. He was the exemplification of the true Southern gentleman." Judge Collins had taken his judicial oath of office at the White House in the presence of his friend, the President, who spoke of him in complimentary terms. The President's sentiments were shared by all who knew Judge Collins and who enjoyed the privilege of his friendship. He lies buried in his beloved Georgia at Sautee-Nacoochee.

References: U.S. COURT OF CLAIMS REPORTS, Vol. 200 (469 F. 2d); WHO'S WHO IN AMERICA, Vol. 1 (1972–1973); CONGRESSIONAL DIRECTORY, 91st Cong., 2d Sess. (1971); Bicentennial Committee Biographical Questionnaire, Judicial Conference of the United States, prepared by his secretary, Mrs. Cleopatra P. Stark.



Byron George Skelton

Byron George Skelton

TEXAS

*43d Judge—1966–____**

Byron Skelton was born in Florence, Williamson County, Texas, on September 1, 1905, the son of Clarence Edgar (1882–1975), a farmer and merchant, and Avis Ione (Bowmer) Skelton (1885–1958). The future judge had seven brothers and two sisters: Hiram Bowmer (1903–1953), a theatre owner; William Hiram (b. 1907), chairman of the Board of Pardons and Paroles of Texas; Clarence Edgar, Jr. (1909–1928); Barnet B. (b. 1912), a lawyer; Max DeWitt (b. 1914), who is with the Texas Public Welfare Office; Howard (b. 1919), a theatre manager; Joe Ray (b. 1921), an assistant postmaster; Margaret Lena (Skelton) Alsup (b. 1914); and Kathryn (Skelton) Lee (b. 1923).

After attending public schools in Clarendon, Ashtola, Goldston, and Groom, Texas, Byron Skelton entered Baylor University at Waco, Texas, where he spent one year. Thereafter, he attended the University of Texas in Austin, receiving his B.A. degree in political science in 1927, his M.A. degree in 1928, also in political science, and his LL.B. in 1931. As an undergraduate he was Phi Beta Kappa, Pi Sigma Alpha, Sigma Delta Pi, a member of the Tejas Club, a Rhodes scholar nominee, and a cum laude graduate. He was also a member of the students' assembly and president of the student body. In law school he was on the law review staff.

Admitted to the Texas bar in 1931, he commenced the private, general practice of law in Temple, Texas, and was a partner in the firm of Saulsbury & Skelton from 1934 to 1942, the firm of Saulsbury, Skelton, Everton, Bowmer & Courtney from 1944 to 1955, and the firm of Skelton, Bowmer & Courtney from 1955 to 1966. He was elected county attorney of Bell County, Texas, serving from 1934 to 1938, and served by appointment as city attorney of Temple from 1945 to 1960. In the years 1942 to 1945 Byron Skelton was special assistant and legal adviser to the U.S. Ambassador to Argentina. Always active in local civic and legal affairs, he was president of the Bell-Lampasas-Mills Counties Bar Association and a member of the grievance and legislative committees of the State bar of Texas. He is a member of the American Bar Association, the American Law Institute, and the American Judicature Society. He was twice president of the Temple Kiwanis

*Retired May 1, 1977.

Club (1933 and 1938), president of the Temple Chamber of Commerce (1946–1947), president of the Temple YMCA (1939), and president of the USO Council and of the Ex-Students Association of the University of Texas (1950–1952). He is Past Worshipful Master and D.D.G.M. of Knob Creek Lodge No. 401 of the Masons at Temple, and a member of the Shrine, Karem Temple, Waco, Texas. He was a member of the board of directors and president of the Temple, Texas, Industrial Foundation and a director of the First National Bank of Temple.

Active in political affairs of the Democratic Party, Byron Skelton was chairman of the Democratic Advisory Council of Texas from 1955 to 1957 and a delegate to each of the nine State conventions from 1946 to 1964 and vice chairman of the conventions in 1948 and 1958. He was a delegate to the Democratic National Conventions in 1948, 1956, 1960, and 1964, serving on the Credentials Committee from 1956 to 1964, was the Texas Democratic National Committeeman from 1956 to 1964, and was chairman of the Texas Inaugural Committee in 1961. While Judge Skelton was the Democratic National Committeeman for Texas, and upon learning of the proposed visit of President John F. Kennedy to Dallas on November 22, 1963, he became deeply concerned about the President's safety because of some hostile, inflammatory statements appearing in the press. He had a premonition that because of these statements there might be some violence, and wrote to the President's brother, Attorney General Robert F. Kennedy, on November 4, 1963, and to Walter Jenkins, administrative assistant to Vice President Johnson, on November 6, 1963, urging that Dallas be omitted from the President's itinerary of the State's urban centers. He also made a trip to Washington, D.C., to see Chairman John Bailey of the Democratic National Committee to make the same admonition. Had his warning been heeded, the President's assassination might have been avoided.

On August 17, 1966, Byron Skelton was nominated by his friend and fellow Texan, President Lyndon B. Johnson, to be a judge of the U. S. Court of Claims. He was one of two additional judges authorized by 80 Stat. 139 (1966), which enlarged the court from five to seven judges. He was confirmed by the Senate on October 20, 1966, was commissioned on November 3, 1966, and took his oath of office and assumed his judicial duties on November 9, 1966.

In 1973 Judge Skelton administered the oath of office to his friend, Leon Jaworski, the Watergate Special Prosecutor, in a ceremony in the Court of Claims courtroom. On many occasions through the years he has sat by special designation as a judge on the United States Circuit Court of Appeals for the Fifth Circuit.

He maintains an office in Temple, Texas, and residences in Temple and nearby Salado, Texas.

On November 28, 1931, Byron Skelton was married to Ruth Alice Thomas (b. October 29, 1907), and they are the parents of Sue Helen (Mrs. Jerry Ramsey, b. April 8, 1935) and Sandra Ruth (Mrs. Robert T. Farrell, b. June 2, 1937), and the grandparents of seven granchildren. Before her marriage Mrs. Skelton was secretary to the Casualty Insurance Commissioner of Texas.

Judge Skelton is a hunter and fisherman, collects Indian lore and artifacts and mint and proof sets of U.S. coins, and has always been interested in gardening and in the growing of flowers, particularly roses and geraniums. He has received many honors and in 1959 was named a Kentucky colonel and an admiral in the Texas Navy. He is an honorary member of Delta Theta Phi.

The Skeltons are active members of the Methodist Church, and Judge Skelton is a former trustee and member of the Board of Stewards of the church in Temple, Texas.

References: CONGRESSIONAL DIRECTORY, 94th Cong., 2d Sess. (1976); WHO'S WHO IN AMERICA, Vol. 2 (1976–1977); W. MANCHESTER, DEATH OF A PRESIDENT at 34–35 (1967); correspondence of Judge Byron Skelton, Lyndon B. Johnson Library, Austin, Tex.; Bicentennial Committee Biographical Questionnaire, Judicial Conference of the United States (1976).

Philip Nichols, Jr.

Philip Nichols, Jr.

MASSACHUSETTS

44th Judge—1966–____

Philip Nichols, Jr., was born in Boston, Massachusetts, on August 11, 1907, the son of Philip (1875–1956) and Mabel (Gibson) Nichols of Boston. His father—A.B., Harvard (1895); LL.B., Harvard Law School (1898)—was a lawyer and chairman of the Massachusetts State Housing Board. He wrote the authoritative work, NICHOLS ON EMINENT DOMAIN, but his practice specialty was taxation. There were two children in this family, in addition to Philip, Jr.: Katharine (Nichols) Winslow (b. July 1910) and Margaret (Nichols) Fitzgerald (1913–1945).

Nichols attended both public and private schools in Newton, Massachusetts. From 1925 to 1929 he attended Harvard College, from which he received the A.B. degree, concentrating in English. He was on the board of the Harvard Advocate, an undergraduate literary monthly. The next three years he spent as a student in the Harvard Law School from which he received the J.D. degree (now so-called) in June 1932. He was in the Powell Law Club, the Ames Competition, and the Harvard Legal Aid Society.

Upon admission to the Massachusetts bar in 1932, Nichols became an associate in the Boston law firm of Mayberry, Ham & Witte for three years. From 1935 to 1938 he was a partner in the Boston firm of Nichols, Boyer & Morton. He moved to Washington, D.C., in June 1938, and from then to 1941 he was a special attorney in the Lands Division, Department of Justice. From 1942 to 1943 he was a special attorney with the War Production Board and counsel to various industry divisions of the Board. From 1944 to 1946 he was in the Office of the General Counsel, Department of the Navy, dealing in procurement matters, starting in uniform at the grade of lieutenant, junior grade, and ultimately rising to the rank of lieutenant commander. On his separation from active duty in early 1946 he accepted an appointment as a Navy civilian contract attorney.

From 1947 to 1951 he was in the Treasury Department, first as counsel to the Bureau of Federal Supply, and later as Assistant General Counsel, Customs and Narcotics. In the years 1951–1954, he was General Counsel to the Renegotiation Board. He then was admitted to the District of Columbia bar in 1954 and resumed private practice, as an individual attorney, in the years 1954–

1957, specializing in matters before the Renegotiation Board, customs matters, and the probate of estates, the first two so far as allowed by the conflict-of-interest rules effective during that period. From 1957 to 1961 he was a partner in the Washington, D.C., firm of Butler, Koehler & Tausig, with a practice of similar nature.

In the years 1961–1964, Nichols was Commissioner of Customs under Secretary of the Treasury Douglas Dillon. In this position he was the chief of a Treasury bureau of 9,000 employees. He received the Exceptional Service Medal for his discharge of duties under this appointment.

In June 1964 Nichols was appointed to the United States Customs Court in New York City by President Lyndon B. Johnson. He was confirmed by the Senate in September, and President Johnson staged a joint swearing-in at the White House for Nichols and Judge Linton Collins of the Court of Claims. He assumed the bench October 1, 1964. He then lived in New York until 1966.

Under the Act of May 11, 1966, 80 Stat. 139, two additional judges were authorized for the Court of Claims. Judge Nichols received the second of these appointments on October 10, 1966, from President Johnson. He was confirmed by the Senate on October 20, 1966, was commissioned on November 3, 1966, and took the oath of office as judge on December 1, 1966. He thus achieved the distinction of serving as a federal judge on two different United States courts.

Judge Nichols supervised and edited FEDERAL EMINENT DOMAIN (1941), a Government publication, and is the author of *Equalizing Profit & Loss in Renegotiation,* published in the Law Review of the University of Virginia (1959). He is a member of the American and Federal Bar Associations.

Judge Nichols grew to manhood in New England and with a Yankee's love of the sea. As a boy he learned sailing and canoeing from his father, and has almost always owned a boat of some description, muscle- or sail-propelled. He was a member of the Cambridge Boat Club, 1935–1938; the Potomac Boat Club, 1938–1941; the Old Dominion Boat Club, 1947–1953; and the Orienta Yacht Club (Mamaroneck, New York), 1964–1966; and has been a member of the West River Sailing Club, Galesville, Maryland, since 1959. He takes pride in being called a "waterman" rather than a "yachtsman."

In April 1940 he married Dorothy Jackson, of Cotulla, Texas. She was secretary and administrative assistant to Lyndon B. Johnson, from time to time, while he was a member of the Congress and later as Vice President, President, and ex-President

of the United States. Judge and Mrs. Nichols are the parents of Donald (b. April 1941), an engineer at the Night Vision Laboratory, Ft. Belvoir, Virginia; Patricia (Mrs. John Winfield, b. October 1942), divorced, and a law graduate now "articled" in Vancouver, British Columbia; and Christopher (b. June 1952), who is in the furniture business near San Francisco, California. Their one grandchild is Anne Gibson Winfield.

References: CONGRESSIONAL DIRECTORY, 94th Cong., 2d Sess. (1976); WHO'S WHO IN AMERICA, Vol. 2 (1976–1977); Bicentennial Committee Biographical Questionnaire, Judicial Conference of the United States (1976).

Shiro Kashiwa

Shiro Kashiwa

HAWAII

45th Judge—1972–____

Shiro Kashiwa was born on October 24, 1912, in Kohala, Island of Hawaii, Territory of Hawaii, the son of the Reverend Ryuten (1898–1960) and Yukiko (Matsubara) Kashiwa (1890–1944). His father was Bishop at the headquarters in Honolulu of the leading sect of Japanese Buddhism called Jodo Shinshu. The judge is a member of that faith. His father was also a private school teacher and a graduate of Ryukoku University, Kyoto, Japan. He came to Hawaii in 1908. Shiro Kashiwa was one of a family of eight children. He had three brothers—Lester Tetsuro (1916–1972), a physician, Genro (b. 1921), an attorney, and Herbert Koro (b. 1925), a professor of anatomy at the University of Washington Medical School; and four sisters—Edith Shigeko (Kashiwa) Izumi (b. 1910) and Irene Yoshiko (Kashiwa) Franks (b. 1914), both teachers, Anita Atsuko (Kashiwa) Ainge (b. 1918), a nurse, and Judy Takako (Kashiwa) Kawabata (b. 1923), also a teacher.

Shiro Kashiwa attended public schools on the Island of Oahu, Hawaii, and in the years 1930–1932 attended the University of Hawaii in Honolulu. He transferred to the University of Michigan at Ann Arbor, Michigan, and received his B.S. degree in 1935 from that institution. He was a member of Phi Kappa Phi, a scholastic honorary fraternity. In 1936 he received his J.D. degree from the University of Michigan School of Law and was admitted to the Hawaii bar in 1937 and to the District of Columbia bar in 1971.

In 1937 Shiro Kashiwa entered the private practice of law in Hawaii with emphasis on civil matters, especially those relating to the Trading With the Enemy Act. He was appointed by Gov. William F. Quinn as the first Attorney General of Hawaii in 1959 and supervised a staff of 35 lawyers. In 1963 he entered into a law partnership with his brother, Genro, practicing under the firm name of Kashiwa & Kashiwa in Honolulu and specializing in corporate and realty law. President Richard M. Nixon appointed him as the Assistant Attorney General for the Land and Natural Resources Division of the U.S. Department of Justice in 1969. In this capacity he entertained a special interest in enforcement of the environmental laws of the United States.

He represented the United States in a number of important cases before the Supreme Court.

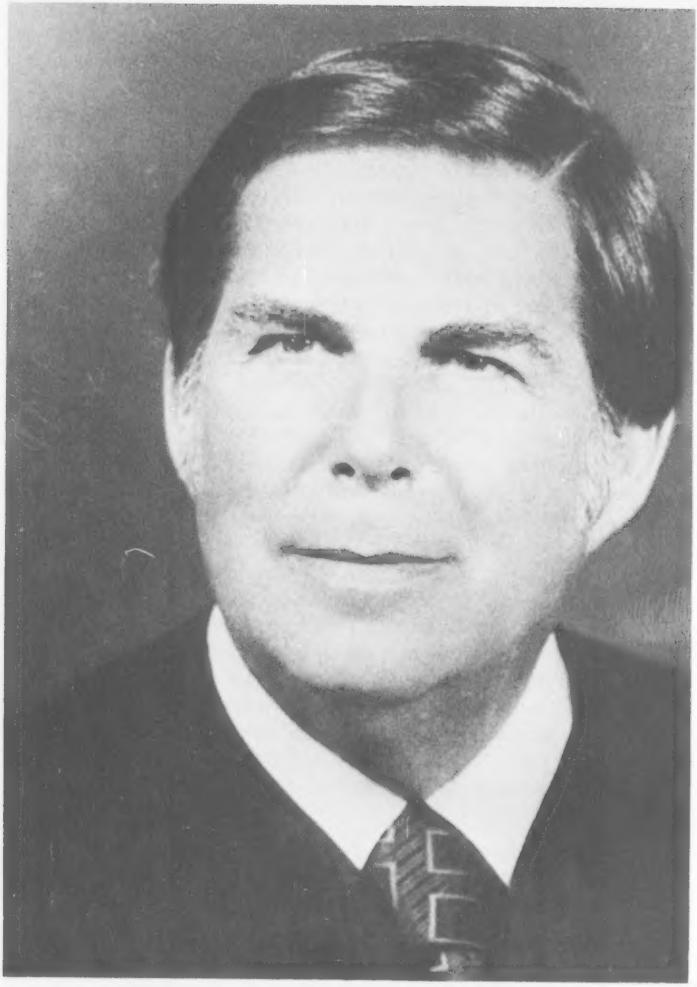
On November 30, 1971, Shiro Kashiwa was nominated by President Nixon to be an associate judge of the Court of Claims, succeeding Judge James R. Durfee, retired. Judge Kashiwa was confirmed by the Senate on December 2, 1971, commissioned on January 3, 1972, and assumed office on January 6, 1972. He was the first American of Japanese ethnic origin to be appointed an assistant attorney general or to the federal bench.

Judge Kashiwa has been active in the Republican Party and in local civic and legal affairs in Hawaii. He was vice chairman of his party in Hawaii in 1956 and 1957. He was both a director and president of the Honpa Hongwanji Mission, a president of the Hawaii Legal Aid Society, a member of the executive committee of the Honolulu Community Chest, and a director of the Kuakini Hospital in Honolulu. In 1970 he was chosen by the Japanese American Citizens League as "Nisei of the Biennium." While a student he was a member of the Lawyers Club at the University of Michigan and has been a member of the school's alumni association since 1936. He is a member of the American Bar Association, the American Judicature Society, the Federal, District of Columbia, and Hawaii Bar Associations, and the International Academy of Trial Lawyers. While Attorney General of Hawaii he was a member of the executive committee of the National Association of Attorneys General. He is a member of the Supreme Court Historical Society and of the Japan-America Society of Washington, D.C., of which he has been a trustee since 1973.

On July 20, 1941, Judge Kashiwa married Mildred Aiko Yamagata, a 1938 graduate of the University of Hawaii from which she received her B.A. degree, and they are the parents of a son, Gregg Ryuji (b. October 1942), a realtor, and a daughter, Wendy Yuki (b. February 1945), an artist and art teacher in Berkeley, California. The Kashiwas are the grandparents of one granddaughter and one grandson.

Judge and Mrs. Kashiwa live at the Watergate Apartments, Washington, D.C.

References: CONGRESSIONAL DIRECTORY, 94th Cong., 2d Sess. (1976); WHO'S WHO IN AMERICA, Vol. 1 (1976–1977); Bicentennial Committee Biographical Questionnaire, Judicial Conference of the United States (1976).



Robert Lowe Kunzig

Robert Lowe Kunzig

PENNSYLVANIA

46th Judge—1972–____

Robert L. Kunzig was born on October 31, 1918, in Philadelphia, Pennsylvania, the son of Dr. Robert Weiss (b. 1890) and Hilda Elsa (Lowe) Kunzig (1890–1973). His father, a high school principal and teacher of physics and chemistry, received his Ph.D. degree from the University of Pennsylvania in 1912, and his mother was a teacher of biology and the German language, receiving her A.B. degree from the same university in 1913. There was one other child in this family, Mrs. Mildred (Wright) Keil (b. April 18, 1923).

The future judge attended the public schools of Philadelphia and graduated in 1935 from Frankford High School as the valedictorian of his class. He then attended the University of Pennsylvania in Philadelphia, majoring in government studies. He was a member of Phi Sigma Kappa, the Mask & Wig Club, and Pi Gamma Mu, and held an academic scholarship awarded by the city—the same scholarship his mother had won 26 years earlier. He was also on the dean's list and is a Phi Beta Kappa. He received his A.B. degree in 1939 and then attended the law school of the same university, graduating in 1942 with a J.D. degree. During the same year he was admitted to the Pennsylvania bar, and in 1961 was admitted to the Minnesota bar.

From 1942 to 1946 Robert L. Kunzig was in the United States Army in World War II and saw service in the European Theatre, reaching the rank of captain. In 1946 and 1947 he was one of the prosecutors of the Buchenwald war crimes case, achieving the conviction of the notorious Ilse Koch. He was awarded the Army Commendation Ribbon with Oakleaf Cluster for his service which also included the responsibility of being executive officer for a top secret War Department program aimed at democratizing Germany. His ancestors came from Germany, and he is fluent in the German language.

Upon his return to the United States, he became an associate in the Philadelphia law firm of Clark, Ladner, Fortenbaugh & Young. He was chairman of the Philadelphia Young Republicans Club from 1948 to 1950 and of the Pennsylvania Young Republicans Club in 1951 and 1952. In 1948 and 1949 he was Assistant Deputy Attorney General of Pennsylvania and the Deputy Attorney Gen-

eral from 1949 to 1953. In 1952 he was a delegate to the Republican National Convention. During the period 1953 to 1955 he was counsel to the Committee on Un-American Activities of the U.S. House of Representatives, after which he became the legal adviser to the Chairman and Executive Director of the Civil Aeronautics Board, serving from 1955 to 1958. By appointment of President Dwight D. Eisenhower, he served as a member of the Foreign Claims Settlement Commission from 1958 to 1961. In Minneapolis, Minnesota, where he lived the following year, he became the vice president of a lumber and construction company and during that same year was the unsuccessful Republican nominee for State attorney general. From 1963 to 1966 he was the administrative assistant and campaign manager for Senator Hugh Scott of Pennsylvania, the Minority Leader of the U.S. Senate. In 1965 he managed the first successful Republican campaign for district attorney of Philadelphia in 16 years, and in 1966 was manager of the successful GOP gubernatorial campaign in Pennsylvania. In 1967 and 1968 he was the executive director of the General State Authority in the cabinet of Gov. Raymond P. Shafer of Pennsylvania, as well as executive director of the State Highway and Bridge Authority and the Pennsylvania Transportation Assistance Authority. President Richard M. Nixon appointed him the Administrator of General Services of the United States, in which position he was the chief executive officer of a staff of over 40,000 employees, serving from 1969 to 1972. He was a member of the President's Cabinet Committee on Construction, the United States Property Review Board, the United States Purchasing and Regulation Review Board, a member of the Commission on Government Procurement, chairman of the administration's Task Force for Minority Businessmen, and a special assistant to the President for coordination of the 1976 Washington, D.C., bicentennial.

Robert L. Kunzig has been honored for his public service, having twice won the Civil Aeronautics Board award, a General Services Administration award, citations by Presidents Eisenhower and Nixon, and recognition by the Governments of Norway, Denmark, France, Germany, and Czechoslovakia. He is a member of the Union League of Philadelphia, the Metropolitan Club of Washington, D.C., has been president of the Mask & Wig Club, is a member of the American, Pennsylvania, Minnesota, and Philadelphia Bar Associations and of the Juristic Society, and has served by appointment of the Chief Justice as a member of the Ad Hoc Committee on Court Facilities and Design of the Judicial Conference. He has published articles in American and Look magazines and the Pennsylvania Bar Association Quarterly, and

has delivered public addresses to legal and civic groups in most states and before the American Bar Association in London, England. Robert L. Kunzig has crossed the Atlantic some 35 times, is an avid sailor, and while a college student had a jazz band and played for the entertainment of passengers on major ocean liners to and from Europe.

On December 6, 1951, Robert L. Kunzig was married to Pamela Wilson Chappell, and they are the parents of Kim (Kunzig) Stalker (b. May 21, 1954), and Robert Lowe Kunzig, Jr. (b. December 2, 1957). The marriage ended in divorce in 1966. The Kunzigs are members of the Episcopal Church.

On November 18, 1971, Robert L. Kunzig was nominated by President Richard M. Nixon to be an associate judge of the U.S. Court of Claims. He was confirmed by the Senate on December 2, 1971, was commissioned on January 3, 1972, and took his oath of office and assumed his judicial duties on January 17, 1972, succeeding Judge Don N. Laramore, retired.

References: WHO'S WHO IN AMERICA, Vol. 1 (1976–1977); CONGRESSIONAL DIRECTORY, 94th Cong., 2d Sess. (1976); R. L. Kunzig, *Social Benefits Through Government Contracts*, PA. BAR ASS'N Q., Vol. XLIII, No. 1 (Oct. 1971); Bicentennial Committee Biographical Questionnaire, Judicial Conference of the United States (1976).

Marion Tinsley Bennett

Marion Tinsley Bennett

MARYLAND (MISSOURI)

47th Judge—1972–____

Marion T. Bennett was born on June 6, 1914, in Buffalo, Missouri, the son of Philip Allen (1881–1942) and Mary Bertha (Tinsley) Bennett (b. 1891), both of whom were born in Dallas County, Missouri. He has a sister, Mary Edith (Mrs. F. Gordon Robertson, b. January 16, 1916) of Springfield, Missouri. His father was the owner and editor of the weekly newspaper, The Buffalo Reflex, a State senator from 1920 to 1924, Lieutenant Governor of Missouri from 1924 to 1928, a Republican member of the 77th Congress and member-elect of the 78th Congress. Marion T. Bennett was named after his grandfathers. His paternal grandfather was a Missourian and Union veteran of the Civil War.

Marion Bennett attended public schools in Springfield, Missouri, where he was president of his class during his junior and senior high school years. He was awarded a scholarship in 1932 to attend Southwest Missouri State University in Springfield, and in 1935 received an A.B. degree with highest distinction in scholarship. While a college student he was president of his class, editor of the weekly Southwest Standard, and a member of the student council, and continued his activity in debate and oratory in which he annually won state, regional or national championships, beginning in Jarrett Junior High School in Springfield. He was awarded a scholarship to Washington University School of Law in St. Louis, Missouri, by Dean Wiley B. Rutledge, later a Justice of the United States Supreme Court, and graduated with an LL.B. degree (later changed to J.D.) in 1938. He was on the law review staff, was a moot court winner, and was on the university's international debate team. He was employed by the university in student jobs for three years.

Admitted to the Missouri bar in 1938, Marion Bennett began the private practice of law in Springfield and taught commercial law as a substitute teacher at the university. He was elected a member of the Greene County (Missouri) Republican Central Committee from the Ninth Springfield Ward in 1938, 1940, and 1942, managed his father's two successful campaigns for Congress, and was a delegate to the Missouri Republican State Conventions six times during the period 1938 to 1948. Upon the death of his father he was elected, at 28 years of age, at a special

election on January 12, 1943, to the 78th Congress from the then Sixth Missouri Congressional District and was reelected to the 79th and 80th Congresses, serving from 1943 to 1949. He was a member of the Committees on Veterans' Legislation and Interstate and Foreign Commerce and was a co-author of the first G.I. Bill of Rights for veterans' benefits. In 1945, by invitation of General Dwight D. Eisenhower, Supreme Allied Commander, and by designation of the Speaker of the House, he was one of 10 members of the House and Senate who constituted an official delegation of Congress which accompanied the United States Army soon after it overran the infamous Nazi concentration camp at Buchenwald, near Weimar, Germany. 91 Cong. Rec. (Part 11) A2128 (1945). Members of the delegation thereafter toured the United States, individually, describing to the American people what they saw at Buchenwald. He was narrowly defeated for reelection in the 1948 Truman Democratic landslide.

On January 4, 1949, the day after his third term expired in the House, Marion T. Bennett was appointed a trial commissioner (trial judge since 1972) of the U.S. Court of Claims. He renounced further active participation in politics and remained a commissioner, becoming Chief Commissioner of the court's Trial Division on September 11, 1964, after the appointment of Chief Commissioner Wilson Cowen as Chief Judge. Marion Bennett served as Chief Commissioner until his appointment by President Richard M. Nixon as an associate judge of the Court of Claims, succeeding Judge Linton M. Collins, deceased. He was confirmed by the Senate and commissioned on June 28, 1972, and assumed the duties of that office upon taking his oath on July 7, 1972. The American Bar Association Standing Committee on the Federal Judiciary and the Federal and District of Columbia Bar Associations gave him their highest rating for appointment. He was a legal resident of Montgomery County, Maryland, at the time of his appointment to the court.

Judge Bennett was a member of the Building Committee for the new courthouse which was dedicated in 1967 and a member of the court's Standing Committee on Rules. He is a member of the American, District of Columbia, Missouri (inactive), and Federal Bar Associations and was a member of the National Council of the FBA from 1958 to 1976. He is a member of the Reserve Officers Association, the Judge Advocates Association, Delta Theta Phi legal fraternity, National Lawyers Club, Former Members of Congress, past president of the Bethesda-Chevy Chase Exchange Club, and former trustee of the Chevy Chase Methodist Church, as well as president of the Men's Club and twice chairman of the administrative board of that church. He is a colonel, retired,

United States Air Force Ready Reserve. In 1964 he received the Outstanding Alumnus Award of Southwest Missouri State University and the Award of Merit from the American Academy of Public Affairs; the Patriotic Service Medal of the American Coalition of Patriotic Societies in 1963; and the Legion of Merit, U.S. Air Force, in 1974. Judge Bennett is the author of a number of legal articles published in various journals, and the author of the reference book, AMERICAN IMMIGRATION POLICIES, A HISTORY (1963), published under the auspices of Drury College, Springfield, Missouri. He has the distinction of having held commissions in all three branches of the Federal Government—legislative, executive, and judicial.

On April 27, 1941, Judge Bennett married June Young of Hurley, Missouri, a high school teacher at Galena, Missouri, and honor graduate of Southwest Missouri State University (B.S., 1938). They are the parents of Ann (Mrs. Paul B. Guptill, b. June 3, 1944), a graduate of Southwest Missouri State University (1966), and William Philip (b. September 2, 1945), a graduate of Princeton University (1968) and Duke University School of Law (1974) and an Army combat engineer officer in the Vietnam conflict. The Bennetts have two grandsons by their daughter.

References: WHO'S WHO IN AMERICA, Vol. 1 (1976–1977); BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS (1774–1971); CONGRESSIONAL DIRECTORY, 94th Cong., 2d Sess. (1976); M. T. Bennett, *The United States Court of Claims, A 50-Year Perspective*, 29 FED. B.J. 284 (1970); M. T. Bennett, *Private Claims Act and Congressional References*, 9 AF JAG L. REV., No. 6 (1967); M. T. Bennett, *Immigration and Nationality (McCarran–Walter) Act of 1952, as Amended to 1965*, 367 ANNALS 127–136, Am. Acad. of Polit. & Soc. Sci. (Sep. 1966); Bicentennial Committee Biographical Questionnaire, Judicial Conference of the United States (1976).

TABLE I
JUDGES OF THE U.S. COURT OF CLAIMS (1855–1976)

(In Order of Appointment, By Whom Appointed, Years of Service)

Name	By Whom Appointed	Years of Service
Gilchrist, John James (1)	Pierce	1855–1858 (1st Presiding Judge)
Blackford, Isaac Newton (2)	Pierce	1855–1859
Scarburgh (Scarborough), George Parker (3)	Pierce	1855–1861
Loring, Edward Greely (4)	Buchanan	1858–1877
Hughes, James (5)	Buchanan	1860–1864
Casey, Joseph (6)	Lincoln Lincoln	1861–1863 1863–1870 (1st Chief Justice) [1]
Wilmot, David (7)	Lincoln	1863–1868
Peck, Ebenezer (8)	Lincoln	1863–1878
Nott, Charles Cooper (9)	Lincoln Cleveland	1865–1896 1896–1905 (4th Chief Justice)
Milligan, Samuel (10)	A. Johnson	1868–1874
Drake, Charles Daniel (11)	Grant	1870–1885 (2d Chief Justice)
Richardson, William Adams (12)	Grant Arthur	1874–1885 1885–1896 (3d Chief Justice)
Davis, J. C. Bancroft (13)	Hayes Arthur	1877–1881 1882–1883 (2d appointment)
Hunt, William Henry (14)	Hayes	1878–1881
Scofield, Glenni William (15)	Garfield	1881–1891
Weldon, Lawrence (16)	Arthur	1883–1905
Davis, John (17)	Arthur	1885–1902
Peelle, Stanton Judkins (18)	Harrison T. Roosevelt	1892–1906 1906–1913 (5th Chief Justice)
Howry, Charles Bowen (19)	Cleveland	1897–1915
Wright, Francis Marion (20)	T. Roosevelt	1903–1905
Booth, Fenton Whitlock (21)	T. Roosevelt Coolidge	1905–1928 1928–1939 (7th Chief Justice)
Atkinson, George Wesley (22)	T. Roosevelt	1905–1916
Barney, Samuel Stebbins (23)	T. Roosevelt	1906–1919
Campbell, Edward Kernan (24)	Wilson	1913–1928 (6th Chief Justice)

See footnotes at end of table.

Name	By Whom Appointed	Years of Service
Downey, George Eddy (25)	Wilson	1915–1926
Hay, James (26)	Wilson	1916–1927
Graham, Samuel Jordan (27)	Wilson	1919–1930
Moss, John McKenzie (28)	Coolidge	1926–1929
Green, William Raymond (29)	Coolidge	1928–1940
Sinnott, Nicholas John (30)	Coolidge	1928–1929
Littleton, Benjamin Horsley (31)	Hoover	1929–1958
Williams, Thomas Sutler (32)	Hoover	1929–1940
Whaley, Richard Smith (33)	Hoover F. D. Roosevelt	1930–1939 1939–1947 (8th Chief Justice)
Whitaker, Samuel Estill (34)	F. D. Roosevelt	1939–1964
Jones, (John) Marvin (35)	F. D. Roosevelt Truman	1940–1947 1947–1964 (9th Chief Justice) [2]
Madden, Joseph Warren (36)	F. D. Roosevelt	1941–1961
Howell, (George) Evan (37)	Truman	1947–1953
Laramore, Don Nelson (38)	Eisenhower	1954–1972
Durfee, James Randall (39)	Eisenhower	1960–1972
Davis, Oscar Hirsh (40)	Kennedy	1962–
Cowen, Wilson (41)	L. B. Johnson	1964– (10th Chief Judge) [3]
Collins, Linton McGee (42)	L. B. Johnson	1964–1972
Skelton, Byron George (43)	L. B. Johnson	1966– [4]
Nichols, Philip, Jr. (44)	L. B. Johnson	1966–
Kashiwa, Shiro (45)	Nixon	1972–
Kunzig, Robert Lowe (46)	Nixon	1972–
Bennett, Marion Tinsley (47)	Nixon	1972–

[1] First Chief Justice authorized by law, ch. 92, 12 Stat. 765 (1863).
[2] Title changed to Chief Judge by law, ch. 646, 62 Stat. 898 (1948).
[3] Retired March 1, 1977.
[4] Retired May 1, 1977.

TABLE II
JUDGES OF THE U.S. COURT OF CLAIMS (1855–1976)

(Dates of Birth and Death and Age at Time of Death)

Name	Date of Birth	Date of Death	Age at Time of Death		
			yrs.	mos.	ds.
Atkinson, George Wesley	June 29, 1845	Apr. 4, 1925	79	9	5
Barney, Samuel Stebbins	Jan. 31, 1846	Dec. 31, 1919	73	11	0
Bennett, Marion Tinsley	June 6, 1914	—			
Blackford, Isaac Newton	Nov. 6, 1786	Dec. 31, 1859	73	1	25
Booth, Fenton Whitlock	May 12, 1869	July 26, 1947	78	2	14
Campbell, Edward Kernan	Apr. 17, 1858	Dec. 7, 1938	80	7	20
Casey, Joseph	Dec. 17, 1814	Feb. 10, 1879	64	1	23
Collins, Linton McGee	June 21, 1902	Apr. 12, 1972	69	9	21
Cowen, Wilson	Dec. 20, 1905	—			
Davis, J. C. Bancroft	Dec. 29, 1822	Dec. 27, 1907	84	11	28
Davis, John	Sep. 16, 1851	May 5, 1902	50	7	19
Davis, Oscar Hirsh	Feb. 27, 1914	—			
Downey, George Eddy	July 11, 1860	May 24, 1926	65	10	13
Drake, Charles Daniel	Apr. 11, 1811	Apr. 1, 1892	80	11	20
Durfee, James Randall	Nov. 3, 1897	—			
Gilchrist, John James	Feb. 16, 1809	Apr. 29, 1858	49	2	13
Graham, Samuel Jordan	July 27, 1859	Jan. 20, 1951	91	5	23
Green, William Raymond	Nov. 7, 1856	June 11, 1947	90	7	4
Hay, James	Jan. 9, 1856	June 12, 1931	75	5	3
Howell, (George) Evan	Sep. 21, 1905	—			
Howry, Charles Bowen	May 14, 1844	July 20, 1928	84	2	6
Hughes, James	Nov. 24, 1823	Oct. 21, 1873	49	10	27
Hunt, William Henry	June 12, 1823	Feb. 27, 1884	60	8	15
Jones, (John) Marvin	Feb. 26, 1882	Mar. 4, 1976	94	0	8
Kashiwa, Shiro	Oct. 24, 1912	—			
Kunzig, Robert Lowe	Oct. 31, 1918	—			
Laramore, Don Nelson	Dec. 22, 1906	—			
Littleton, Benjamin Horsley	Aug. 27, 1889	July 6, 1966	76	10	9
Loring, Edward Greely	Jan. 28, 1802	June 19, 1890	88	4	21

Name	Date of Birth	Date of Death	Age at Time of Death		
			yrs.	mos.	ds.
Madden, Joseph Warren	Jan. 17, 1890	Feb. 17, 1972	82	1	0
Milligan, Samuel	Nov. 16, 1814	Apr. 20, 1874	59	5	4
Moss, John McKenzie	Jan. 3, 1868	June 11, 1929	61	5	8
Nichols, Philip, Jr.	Aug. 11, 1907	—			
Nott, Charles Cooper	Sep. 16, 1827	Mar. 6, 1916	88	5	20
Peck, Ebenezer	May 22, 1805	May 25, 1881	76	0	3
Peelle, Stanton Judkins	Feb. 11, 1843	Sep. 4, 1928	85	6	23
Richardson, William Adams	Nov. 2, 1821	Oct. 19, 1896	74	11	17
Scarburgh (Scarborough), George Parker	Feb. 11, 1806	Dec. 21, 1879	73	10	10
Scofield, Glenni William	Mar. 11, 1817	Aug. 30, 1891	74	5	19
Sinnott, Nicholas John	Dec. 6, 1870	July 20, 1929	58	7	14
Skelton, Byron George	Sep. 1, 1905	—			
Weldon, Lawrence	Aug. 9, 1829	Apr. 10, 1905	75	8	1
Whaley, Richard Smith	July 15, 1874	Nov. 8, 1951	77	3	23
Whitaker, Samuel Estill	Sep. 25, 1886	Mar. 26, 1967	80	6	1
Williams, Thomas Sutler	Feb. 14, 1872	Apr. 5, 1940	68	1	21
Wilmot, David	Jan. 20, 1814	Mar. 16, 1868	54	1	26
Wright, Francis Marion	Aug. 5, 1844	July 15, 1917	72	11	10

TABLE III
JUDGES OF THE U.S. COURT OF CLAIMS (1855–1976)
(States From Which Appointed)

State	Number of Judges From State	Judges Whose Appointments Were Made From State
Alabama	1	Campbell
District of Columbia	2	Collins, Davis (John)
Hawaii	1	Kashiwa
Illinois	6	Booth, Howell, Peck, Weldon, Williams, Wright
Indiana	5	Blackford, Downey, Hughes, Laramore, Peelle
Iowa	1	Green
Louisiana	1	Hunt
Kentucky	1	Moss
New Hampshire	1	Gilchrist
New York	3	Davis (J. C. B.), Davis (Oscar), Nott
Maryland	2	Bennett, Cowen
Massachusetts	3	Loring, Nichols, Richardson
Mississippi	1	Howry
Missouri	1	Drake
Pennsylvania	6	Casey, Graham, Kunzig, Madden, Scofield, Wilmot
Oregon	1	Sinnott
South Carolina	1	Whaley
Tennessee	3	Littleton, Milligan, Whitaker
Texas	2	Jones, Skelton
Virginia	2	Hay, Scarburgh
West Virginia	1	Atkinson
Wisconsin	2	Barney, Durfee
	—	
Total judges	47	

TABLE IV
JUDGES OF THE U.S. COURT OF CLAIMS (1855–1976)
(Length of Service—In Order of Length)

Judge	Years	Months	Days
Nott, Charles C.	40	10	9
Booth, Fenton W.	34	2	23
Littleton, Benjamin H.	28	11	20
Whitaker, Samuel E.	24	11	22
Jones, Marvin	23	7	24
Richardson, William A.	21	10	26
Weldon, Lawrence	21	3	23
Peelle, Stanton J.	20	10	4
Madden, J. Warren	20	7	7
Loring, Edward G.	19	6	25
Howry, Charles B.	18	1	7
Laramore, Don N.	17	8	16
Davis, John	17	2	9
Whaley, Richard S.	17	1	5
Peck, Ebenezer	15	1	7
Campbell, Edward K.	14	10	15
Drake, Charles D.	14	0	23
Barney, Samuel S.	13	3	13
Green, William R.	12	1	28
Durfee, James R.	11	8	4
Hay, James	11	2	1
Atkinson, George W.	10	11	14
Graham, Samuel J.	10	8	0
Downey, George E.	10	7	20
Williams, Thomas S.	10	4	24
Scofield, Glenni W.	9	8	1
Casey, Joseph	9	6	7
Collins, Linton M.	7	6	11
Howell, Evan	5	11	24
Scarburgh, George P.	5	11	3
Milligan, Samuel	5	6	27
Wilmot, David	5	0	5
Hughes, James	4	10	10
Blackford, Isaac N.	4	9	28
Davis, J. C. Bancroft	4	9	5
Gilchrist, John J.	3	1	26
Moss, John M.	2	11	27
Hunt, William H.	2	3	16
Wright, Francis M.	2	1	15
Sinnott, Nicholas J.	1	1	19
Current Active Judges (1976):			
Davis, Oscar H.	(1962)		
Cowen, Wilson	(1964) [1]		
Skelton, Byron G.	(1966) [2]		
Nichols, Philip, Jr.	(1966)		
Kashiwa, Shiro	(1972)		
Kunzig, Robert L.	(1972)		
Bennett, Marion T.	(1972)		

[1] Retired March 1, 1977 (12 years, 7 months, 17 days).
[2] Retired May 1, 1977 (10 years, 5 months, 22 days).

TABLE V
OTHER PUBLIC POSITIONS HELD BY JUDGES OF THE UNITED STATES COURT OF CLAIMS

Judge	Other Judicial (Fed. or State)	State Legislature	U.S. Congress	Public Service Other Than Indicated in Preceding Columns
Atkinson, George W.		X	X	Governor, West Virginia; U.S. District Attorney; Internal Revenue Agent; Postmaster; U. S. Marshal; Ass't County School Superintendent
Barney, Samuel S.			X	County School Superintendent
Bennett, Marion T.			X	Commissioner and Chief Commissioner, U.S. Court of Claims
Blackford, Isaac N.	X	X		First Speaker, Indiana House; Reporter, Indiana Supreme Court; First Clerk & Recorder (Wash. Co., Ind.); Clerk, Territorial Legislature
Booth, Fenton W.		X		Chairman, Board No. 10, OPA
Campbell, Edward K.				Special Master for U.S. Supreme Court
Casey, Joseph			X	Reporter, Pennsylvania Supreme Court; Commissioner, Erie R.R. War Arbitration
Collins, Linton M.				First Ass't, U.S. Deputy Attorney General; Special Ass't to U.S. Attorney General; Division Administrator, NRA

Cowen, Wilson	X			Commissioner and Chief Commissioner, U.S. Court of Claims; Special Ass't to U.S. Secretary of Agriculture; Ass't Administrator, War Food Administration; Regional Director, FSA; Associate Director, Rural Rehabilitation Division, FSA; Texas State Director, FSA
Davis, J. C. Bancroft		X		Ass't U.S. Secretary of State; U.S. Minister to Germany; Secretary, *Alabama* Claims Commission; Secretary, American Legation, Great Britain; Reporter, U.S. Supreme Court
Davis, John				Ass't U.S. Secretary of State; Clerk, *Alabama* Claims Commission; Ass't Counsel, French-American Claims Commission; Private Secretary to U.S. Secretary of State
Davis, Oscar H.				Acting U.S. Solicitor General; Ass't U.S. Solicitor General; Attorney, Supreme Court Section, U.S. Dept. of Justice
Downey, George E.	X			Comptroller, U.S. Dept. of Treasury; Mayor
Drake, Charles D.		X	X	Founder, St. Louis Law Library
Durfee, James R.				Chairman, CAB; Member and Chairman, Wisconsin Public Service Commission; District Attorney (Langlade Co., Wisc.); Court Commissioner, State Circuit

Judge	Other Judicial (Fed. or State)	State Legislature	U.S. Congress	Public Service Other Than Indicated in Preceding Columns
Gilchrist, John J.	X	X		Chief Justice, New Hampshire Supreme Court; Register of Probate (N.H.)
Graham, Samuel J.				Ass't U.S. Attorney General
Green, William R.	X		X	Chairman, House Ways & Means Committee; Chairman, Joint Committee on Internal Revenue
Hay, James		X	X	Chairman, House Military Affairs Committee; Chairman, Democratic House Caucus; County Attorney
Howell, Evan			X	Consultant, FAA; Chairman, Illinois Toll Highway Authority; Referee in Bankruptcy (Ill.); Special Master (Ill.)
Howry, Charles B.		X		Ass't U.S. Attorney General; U.S. District Attorney; Chairman, Board of Arbitration; Special Counsel, U.S. Dept. of Labor
Hughes, James	X	X	X	Cotton Agent, U.S. Dept. of Treasury
Hunt, William H.				U.S. Secretary of Navy; U.S. Minister to Russia
Jones, Marvin			X	Administrator, War Food Administration; Chairman, House Committee on Agriculture; Ass't to Director of Economic Stabilization; Member, Combined Food Board; President, United Nat'l Conference on Food & Agriculture;

			Member, War Mobilization Committee; Special Master for U.S. Supreme Court
Kashiwa, Shiro			Ass't U.S. Attorney General, Land & Natural Resources Division; State Attorney General (Hawaii)
Kunzig, Robert L.			Administrator, GSA; Legal Adviser to Chairman, CAB; Counsel, House Committee on Un-American Activities; Deputy Attorney General (Pa.); Executive Director, General State Authority (Pa.); Executive Director, State Highway & Bridge Authority and State Transportation Assistance Authority; Member, Foreign Claims Settlement Commission
Laramore, Don N.	X		
Littleton, Benjamin H.			Chairman, U.S. Board of Tax Appeals (now Tax Court); Ass't U.S. Attorney (Tenn.); Special Attorney, Bureau of Internal Revenue
Loring, Edward G.	X		U.S. Commissioner (Mass.); Master in Chancery (Mass.); Boston School Committee on Reforms
Madden, Joseph W.			Chairman, NLRB; Special Ass't to U.S. Attorney General; Ass't Director, Legal Division, and Adviser to U.S. Military Governor, Office of Military Gov't for Germany
Milligan, Samuel	X	X	Member of "Peace Congress" (1861); Commissioner to Rerun Boundaries

Judge	Other Judicial (Fed. or State)	State Legislature	U.S. Congress	Public Service Other Than Indicated in Preceding Columns
Moss, John M.	X		X	Ass't U.S. Secretary of Treasury; Deputy Commissioner, Internal Revenue; Ass't General Counsel and General Counsel, Alien Property Custodian
Nichols, Philip, Jr.	X			Commissioner of Customs; Ass't General Counsel, Customs & Narcotics, U.S. Dept. of Treasury; General Counsel, Renegotiation Board; Special Attorney, U.S. Dept. of Justice; Special Attorney, WPB; Attorney, Office of General Counsel, U.S. Dept. of Navy
Nott, Charles C.				Reporter, U.S. Court of Claims; Trustee, N.Y. City Public Schools; Commissioner to Revise N.Y. City School System
Peck, Ebenezer		X		Reporter, Illinois Supreme Court; Clerk, Illinois Supreme Court; King's Counsel and Member of Provincial Parliament, Canadian Gov't
Peelle, Stanton J.		X	X	Ass't District Attorney (Marion Co., Ind.); War Department Claims Board
Richardson, William A.	X			U.S. Secretary of Treasury; Ass't U.S. Secretary of Treasury; Acting U.S. Attorney General; Editor, Massachusetts Statutes;

				Annotated Revised U.S. Statutes; Harvard Board of Overseers, President, Common Council (Mass.); Justice of the Peace (Mass.)
Scarburgh, George P.	X			
Scofield, Glenni W.	X	X	X	Chairman, House Committee on Naval Affairs; Register, U.S. Dept. of Treasury; District Attorney (Warren Co., Pa.)
Sinnott, Nicholas J.		X	X	Chairman, House Committee on Public Lands
Skelton, Byron G.				Special Ass't and Legal Adviser to U.S. Ambassador to Argentina; County Attorney and City Attorney
Weldon, Lawrence		X		U.S. District Attorney; Clerk, Office of Ohio Secretary of State
Whaley, Richard S.		X	X	Commissioner, U.S. Court of Claims; Speaker, South Carolina House; Chairman, D.C. Rent Commission
Whitaker, Samuel E.				Ass't U.S. Attorney General, Claims Division; Special Ass't to U.S. Attorney General; Special Master for U.S. Supreme Court; Attorney, Internal Revenue; Mayor and City Attorney
Williams, Thomas S.		X	X	Chairman, Illinois Delegation, U.S. Congress; Prosecuting Attorney; Mayor and City Attorney

Judge	Other Judicial (Fed. or State)	State Legislature	U.S. Congress	Public Service Other Than Indicated in Preceding Columns
Wilmot, David	X		X	Member of "Peace Congress" (1861); Author of "Wilmot Proviso"
Wright, Francis M.	X			

Summary:

Number of judges who served in judicial positions other than U.S. Court of Claims 16
Number of judges who served in U.S. Congress 17
Number of judges who served in State legislatures 17

TABLE VI
LINES OF SUCCESSION OF JUDGES

(Read Down—Chief Justices or Chief Judges Indicated by Italics Together With a Number Showing Order of Service)

Gilchrist (1855)	Blackford (1855)	Scarburgh (1855)		Peck (1863)		Wilmot (1863)	Skelton (1966)	Nichols (1966)
Loring	Hughes	*Casey* (1)	*Drake* (2) *	Hunt		Milligan		
Davis, J.C.B.	*Nott* (4)			Scofield		*Richardson* (3)		
Weldon	Howry			*Peelle* (5)	*Campbell* (6) *	Davis, J.		
Atkinson	Downey			Barney		Wright		
Hay	Moss			Graham		*Booth* (7)		
Green	Littleton			*Whaley* (8)		Sinnott Williams		
Madden	Durfee			Whitaker		*Jones* (9)	*Cowen* (10)*	
Davis, O.	Kashiwa			Collins		Howell		
				Bennett		Laramore		
						Kunzig		

* Did not first serve as an associate judge.

TABLE VII
COMPOSITION OF THE COURT

[The following table is designed to aid the user in identifying the composition of the court at any given time. Each listing is headed by the Presiding Judge (1855–1863), the Chief Justice (1863–1948), or Chief Judge (since June 1948), whose name is italicized. Associate judges are placed below in order of seniority.]

1855–1858
Gilchrist
Blackford
Scarburgh

1858–1859
Blackford
Scarburgh
Loring

1860–1861
Scarburgh
Loring
Hughes

1861–1863
Loring
Hughes
Casey

1863–1864
Casey
Loring
Hughes
Wilmot
Peck

1865–1868
Casey
Loring
Wilmot
Peck
Nott

1868–1870
Casey
Loring
Peck
Nott
Milligan

1870–1874
Drake
Loring
Peck
Nott
Milligan

1874–1878
Drake
Loring
Peck
Nott
Richardson

1878–1881
Drake
Nott
Richardson
Davis, J. C. B.
Hunt

1881–1883
Drake
Nott
Richardson
Davis, J. C. B.
Scofield

1883–1885
Drake
Nott
Richardson
Scofield
Weldon

1885–1891
Richardson
Nott
Scofield
Weldon
Davis, John

1892–1896
Richardson
Nott
Weldon
Davis, John
Peelle

1897–1902
Nott
Weldon
Davis, John
Peelle
Howry

1903–1905
Nott
Weldon
Peelle
Howry
Wright

1905–1913
Peelle
Howry
Booth
Atkinson
Barney

1913–1915
Campbell
Howry
Booth
Atkinson
Barney

1915–1916
Campbell
Booth
Atkinson
Barney
Downey

1916–1919
Campbell
Booth
Barney
Downey
Hay

1919–1926
Campbell
Booth
Downey
Hay
Graham

1926–1928
Campbell
Booth
Hay
Graham
Moss

1928–1929
Booth
Graham
Moss
Green
Sinnott

1929–1930
Booth
Graham
Green
Littleton
Williams

1930–1939
Booth
Green
Littleton
Williams
Whaley

1939–1940
Whaley
Green
Littleton
Williams
Whitaker

1940
Whaley
Green
Littleton
Whitaker
Jones

1941–1947
Whaley
Littleton
Whitaker
Jones
Madden

1947–1953
Jones
Littleton
Whitaker
Madden
Howell

1954–1958
Jones
Littleton
Whitaker
Madden
Laramore

1958–1960
Jones
Whitaker
Madden
Laramore
(Vacant)

1960–1961
Jones
Whitaker
Madden
Laramore
Durfee

1962–1964
Jones
Whitaker
Laramore
Durfee
Davis, O.

1964–1966
Cowen
Laramore
Durfee
Davis, O.
Collins

1966–1972
Cowen
Laramore
Durfee
Davis, O.
Collins
Skelton
Nichols

1972–1976
Cowen [1]
Davis, O.
Skelton [2]
Nichols
Kashiwa
Kunzig
Bennett

[1] Retired March 1, 1977.
[2] Retired May 1, 1977.

TABLE VIII
JUDGES OF THE U. S. COURT OF CLAIMS (1855–1976)

(Judicial Service, State From Which Appointed, By Whom Appointed and Politics of Judge)

Name	Date of Commission	Age When Commissioned			Date of Oath	Termination of Service	Total Years of Service (from Oath)			State From Which Appointed	Appointed by	Politics of Judge
		yrs.	*mos.*	*ds.*			*yrs.*	*mos.*	*ds.*			
Atkinson, George W.	Apr. 15, 1905	59	9	16	May 2, 1905	Apr. 16, 1916	10	11	14	W. Va.	T. Roosevelt	Rep.
Barney, Samuel S.	Dec. 20, 1905	59	10	19	Jan. 2, 1906	Apr. 15, 1919	13	3	13	Wisc.	T. Roosevelt	Rep.
Bennett, Marion T.	June 28, 1972	58	0	22	July 7, 1972	—		—		Md.	Nixon	Rep.
Blackford, Isaac N.	Mar. 3, 1855	68	3	27	Mar. 3, 1855	Dec. 31, 1859	4	9	28	Ind.	Pierce	Dem.
Booth, Fenton W. *(as CJ)*	Mar. 17, 1905 —	35	10 —	5	Mar. 22, 1905 Apr. 23, 1928	June 15, 1939	34	2	23	Ill.	T. Roosevelt Coolidge	Rep.
Campbell, Edward K. *(CJ)*	May 22, 1913	55	1	5	June 2, 1913	Apr. 17, 1928	14	10	15	Ala.	Wilson	Dem.
Casey, Joseph *(as CJ)*	May 23, 1861 Mar. 13, 1863	46	5 —	6	May 24, 1861 May 4, 1863	Dec. 1, 1870	9	6	7	Pa.	Lincoln	Rep.
Collins, Linton M.	Sep. 17, 1964 [1]	62	2	26	Oct. 1, 1964	Apr. 12, 1972	7	6	11	D.C.	L. B. Johnson	Dem.
Cowen, Wilson *(CJ)*	July 8, 1964	58	6	18	July 14, 1964	[2]		[2]		Md.	L. B. Johnson	Dem.
Davis, J. C. Bancroft	Dec. 14, 1877	54	11	15	Jan. 7, 1878	Dec. 9, 1881 (1st)	3	11	2	N. Y.	Hayes	Rep.
(2d appm't)	Dec. 20, 1882				Jan. 2, 1883	Nov. 5, 1883 (2d)		10	3		Arthur	
Davis, John	Jan. 20, 1885	33	4	4	Feb. 26, 1885	May 5, 1902	17	2	9	D.C.	Arthur	Rep.

Davis, Oscar H.	Apr. 12, 1962	48	1	15	Apr. 26, 1962	—		—	N.Y.	Kennedy	Ind.
Downey, George E.	Aug. 3, 1915	55	0	22	Oct. 4, 1915	May 24, 1926	10	7	20	Ind.	Wilson	Dem.
Drake, Chas. D. (*CJ*)	Dec. 12, 1870	59	8	1	Dec. 19, 1870	Jan. 12, 1885	14	0	23	Mo.	Grant	Rep.
Durfee, James R.	Apr. 22, 1960	62	5	19	May 2, 1960	Jan. 6, 1972	11	8	4	Wisc.	Eisenhower	Rep.
Gilchrist, John J.	Mar. 3, 1855	46	0	17	Mar. 3, 1855	Apr. 29, 1858	3	1	26	N. H.	Pierce	Dem.
Graham, Samuel J.	July 28, 1919	60	0	1	Sep. 1, 1919	May 1, 1930	10	8	0	Pa.	Wilson	Dem.
Green, William R.		71	4	24[3]	Mar. 31, 1928	May 29, 1940	12	1	28	Iowa	Coolidge	Rep.
Hay, James	July 17, 1916	60	6	8	Sep. 30, 1916	Dec. 1, 1927	11	2	1	Va.	Wilson	Dem.
Howell, (Geo.) Evan	July 30, 1947	41	10	9	Oct. 6, 1947	Sep. 30, 1953	5	11	24	Ill.	Truman	Rep.
Howry, Charles B.	Jan. 28, 1897	52	8	14	Feb. 8, 1897	Mar. 15, 1915	18	1	7	Miss.	Cleveland	Dem.
Hughes, James	Jan. 20, 1860	36	1	26		Dec. 1864	4	10	10	Ind.	Buchanan	Dem.
Hunt, William H.	May 15, 1878	54	11	3	Nov. 25, 1878	Mar. 11, 1881	2	3	16	La.	Hayes	Rep.
Jones, (John) Marvin (*as CJ*)	Apr. 10, 1940 [1] —	58	1 —	14	Nov. 20, 1940 July 10, 1947	July 14, 1964	23	7	24	Tex.	F. D. Roosevelt Truman	Dem.
Kashiwa, Shiro	Jan. 3, 1972	59	2	9	Jan. 6, 1972	—		—		Hawaii	Nixon	Rep.
Kunzig, Robert L.	Jan. 3, 1972	53	2	2	Jan. 17, 1972	—		—		Pa.	Nixon	Rep.
Laramore, Don N.	Mar. 17, 1954	47	2	25	May 1, 1954	Jan. 17, 1972	17	8	16	Ind.	Eisenhower	Rep.
Littleton, Benjamin H.	Nov. 6, 1929	40	2	9	Nov. 11, 1929	Oct. 31,1958	28	11	20	Tenn.	Hoover	Dem.
Loring, Edward G.	May 6, 1858	56	3	8	May 19, 1858	Dec. 14, 1877	19	6	25	Mass.	Buchanan	Dem.
Madden, J. Warren	Jan. 7, 1941	50	11	20	Jan. 8, 1941	Aug. 15, 1961	20	7	7	Pa.	F. D. Roosevelt	Dem.

Name	Date of Commission	Age When Commissioned			Date of Oath	Termination of Service	Total Years of Service (from Oath)			State From Which Appointed	Appointed by	Politics of Judge
		yrs.	*mos.*	*ds.*			*yrs.*	*mos.*	*ds.*			
Milligan, Samuel	July 25, 1868	53	8	9	Sep. 23, 1868	Apr. 20, 1874	5	6	27	Tenn.	A. Johnson	Rep.
Moss, John McKenzie	June 7, 1926	58	5	4	June 14, 1926	June 11, 1929	2	11	27	Ky.	Coolidge	Rep.
Nichols, Philip, Jr.	Nov. 3, 1966	59	2	22	Dec. 1, 1966	—		—		Mass.	L. B. Johnson	Dem.
Nott, Charles C. (*as CJ*)	Feb. 22, 1865 Dec. 15, 1896	37	5 —	6	Mar. 1, 1865 Feb. 8, 1897	Dec. 31, 1905	40	10	9	N.Y.	Lincoln Cleveland	Rep.
Peck, Ebenezer	Mar. 10, 1863	57	9	18	Mar. 24, 1863	May 1, 1878	15	1	7	Ill.	Lincoln	Rep.
Peelle, Stanton J. (*as CJ*)	Mar. 28, 1892 Dec. 20, 1905	49	1	17	Apr. 7, 1892 Jan. 2, 1906	Feb. 11, 1913	20	10	4	Ind.	Harrison T. Roosevelt	Rep.
Richardson, Wm. A. (*as CJ*)	June 2, 1874 Jan. 20, 1885	52	7 —	0	Nov. 23, 1874 Jan. 21, 1885	Oct. 19, 1896	21	10	26	Mass.	Grant Arthur	Rep.
Scarburgh, Geo. P. (Scarborough)	May 8, 1855 [4] [Jan. 22, 1856]	49	2	27		Apr. 11, 1861 [5]	5	11	3	Va.	Pierce	Dem.
Scofield, Glenni W.	May 20, 1881	64	2	9	Nov. 28, 1881	July 29, 1891	9	8	1	Pa.	Garfield	Rep.
Sinnott, Nicholas J.	Apr. 20, 1928	57	4	10	May 31, 1928	July 20, 1929	1	1	19	Ore.	Coolidge	Rep.
Skelton, Byron G.	Nov. 3, 1966	61	2	2	Nov. 9, 1966	([6])		([6])		Tex.	L. B. Johnson	Dem.
Weldon, Lawrence	Nov. 24, 1883	54	3	15	Dec. 17, 1883	Apr. 10, 1905	21	3	23	Ill.	Arthur	Rep.
Whaley, Richard S. (*as CJ*)	June 3, 1930	55	10	18	June 4, 1930 June 28, 1939	July 9, 1947	17	1	5	S. C.	Hoover F. D. Roosevelt	Dem.
Whitaker, Samuel E.	July 13, 1939	52	9	18	July 27, 1939	July 19, 1964	24	11	22	Tenn.	F. D. Roosevelt	Dem.

Williams, Thos. S.		57	8	27[3]	Nov. 11, 1929	Apr. 5, 1940	10	4	24	Ill.	Hoover	Rep.
Wilmot, David	Mar. 7, 1863	49	1	17	Mar. 11, 1863	Mar. 16, 1868	5	0	5	Pa.	Lincoln	Rep.
Wright, Francis M.	Jan. 13, 1903	58	5	8	Feb. 2, 1903	Mar. 17, 1905	2	1	15	Ill.	T. Roosevelt	Rep.

[1] Confirmation date.

[2] Retired March 1, 1977. Total service: 12 years, 7 months, 17 days.

[3] Figured from date of oath. Date of commission or confirmation date not available.

[4] Judge Scarburgh was one of the first three judges nominated. Interim appointment made on May 8, 1855, so he could assist in organization of the newly established U.S. Court of Claims. However, the appointment was not actually confirmed until January 22, 1856, at the next session of Congress.

[5] Judge Scarburgh never formally resigned nor retired. His name last appears on the JOURNAL of the court on April 11, 1861. When faced with the choice of being loyal to the Union or returning to Virginia, he returned to Virginia.

[6] Retired May 1, 1977. Total service: 10 years, 5 months, 22 days.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1977 O—237-541

CASES DECIDED

IN

THE UNITED STATES COURT OF CLAIMS

AUGUST 1, 1976 TO OCTOBER 31, 1976 AND OTHER CASES NOT HERETOFORE PUBLISHED

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543 F.2d 97

MAJOR COAT COMPANY, INC. v. THE UNITED STATES

[No. 31-72. Decided October 20, 1976]

ON THE PROOFS

Renegotiation of contracts; redetermination of excessive profits; factors to be considered in determining excessive; "rated orders"; Government-furnished property; sacrifice of commercial markets.—Plaintiff, a small family-owned corportion fabricating men's civilian clothing, whose principal accounts were McGregor-Doniger Co. and Londontown, Inc., seeks redetermination of the order of the Renegotiation Board that it realized $740,760 in excessive profits for fiscal year ended January 31, 1968. In 1964 the clothing industry experienced a general upturn in sales and earnings that continued until the last quarter of 1969. In 1966 the plaintiff showed a $26,000 net profit on receipts of approximately $900,000. In May 1966 the Army issued plaintiff a "rated order" (which plaintiff was obligated to accept under the Defense Production Act of 1950) for 52,200 trench coats. In undertaking this work, which it completed in the fall of 1966, plaintiff sacrificed the McGregor account. Also in the fall of 1966 another "rated order" was issued to plaintiff for a first procurement of a dress overcoat of extremely complex design and demanding in construction. To fill this order plaintiff not only sacrified the Londontown account, but increased its labor force, expended $28,000 for specialized tools useful for the most part only for making the overcoat, and constructed a new building costing $107,000 at the request of the state authorities to provide additional sanitary facilities for its increased work force. In fiscal year ended January 31, 1968 under a fixed-price contract plaintiff delivered 68,000 overcoats made from Government-furnished property. Alienation of the McGregor and London-

Syllabus

town accounts and financial losses to plaintiff's commercial business resulted. It is *held* (1) that plaintiff should be accorded consideration for the complexities involved in the coat's manufacture; (2) that on the facts of this case the value of the Government-furnished property should be taken into the net renegotiable sales figure and included in calculations of renegotiable profit as a percentage of sales to place plaintiff in parity with a manufacturer that purchases all the materials it uses; (3) after discussing the various statutory factors to be considered in redetermining the excessiveness of plaintiff's profits, for the reasons given, plaintiff, and Major Clothing Co. as a consolidated group, realized excessive profits of $560,000 after elimination of which plaintiff will retain a return on its renegotiable work of 16% of $2,758,050 in sales excluding Government-furnished property, and 11% of $4,004,248 in sales including Government-furnished property. Allowed is the deduction of the special tools' and building's costs against renegotiable receipts found by the trial judge of $25,000 out of the $28,000 in tooling expenses and of one-half of the building construction costs. Judgment is entered on defendant's counter-claim for $560,000 less appropriate state and federal tax credits, plus interest thereon as provided by law, and it is ordered that plaintiff is entitled to a refund of the amount paid to defendant in excess of the judgment entered on the counterclaim, together with interest as provided by law.

Renegotiation of contracts; redetermination of excessive profits; evidence; burden of proof and persuasion.

[1] Sec. 108 of the Renegotiation Act, as amended, providing that judicial review of the Renegotiation Board's order shall occur in a de novo proceeding, requires not only a full, due process trial to develop the facts in the case entirely independent of what the Board may have done, but also that defendant, in seeking the return of monies paid out by it, bear the burden of persuading the court by a preponderance of the evidence that the renegotiated contractor realized excessive profits and that the extent of that excess was as defendant claims.

War and National Defense ⟸ 59

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; character of business.

[2] Sec. 103(e)(5) of the Renegotiation Act providing that determination of excessive profits must take into consideration the character of the renegotiated contractor's business, requires the assembly of basic information about the contractor's total operation during the review year, laying the foundation for a later, meaningful comparison of the contractor's review year business and performance with that of firms functioning in a competitive market.

War and National Defense ⟸ 59

1

Syllabus

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; character of business.

[3] Under the factor of character of the renegotiated contractor's business, consideration should be accorded for the complexities involved in the subject garment's manufacture where the evidence shows that it was complex in construction and design, that its production required a commensurate degree of skill and painstaking care, and that qualified and experienced Government procurement officials acknowledged that the garment was among the most complicated garments ever procured by the military.

War and National Defense ⟸ 59

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; character of business; complexity of end item.

[4] Although the record shows that consideration should be accorded for the complexities involved in the subject garment's manufacture, absent evidence of the dollar value of that consideration, recognition of the complexities can only be considered in comparing the contractor's work and profits with those of other firms functioning in a competitive market under the factor "reasonableness of costs and profits." The assessment of the degree of production complexity is not of itself a vehicle for granting rewards or withholding them, but simply lays the foundation for a later comparison.

War and National Defense ⟸ 59

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; character of business; Government-furnished property.

[5] In considering 32 C.F.R. § 1460.14(b)(2) providing that a contractor who uses Government-furnished property (GFP) is not entitled to as large a profit as the contractor who furnishes the materials itself, analysis of the GFP bailment system shows an allocation of benefits and burdens tantamount to those assumed by one who commercially purchases the materials he uses in manufacturing goods. On the facts of this case, the value of the GFP should be taken into the net renegotiable sales figure, and included in calculations of renegotiable profits as a percentage of sales to place the contractor in parity with a manufacturer that purchases all the materials it uses. This is not the invariable rule; rather the rule is that, in making comparison between a renegotiated contractor and other firms, materials purchased or considered as if purchased by the contractor (including the GFP) must be accounted for in the same manner as materials purchased or properly treated as purchased by the compared firms. This does no more than admit that a contractor may realize a profit on materials he has purchased for use in making his products.

War and National Defense ⟸ 59

Syllabus

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War and National Defense ⟸ 59

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War and National Defense ⟸ 59

1

Syllabus

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War and National Defense ⟸ 59

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War and National Defense ⟸ 59

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War and National Defense ⟸ 59

Syllabus

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; reasonableness of costs and profits. [6] The Renegotiation Act requires that the reasonableness of profits be considered because, unless it is decided that the renegotiable profits were not competitively set, and that they rose substantially above the competitively fixed profits of comparable firms, there can be no finding that excessive profits were realized. That the touchstone of this statutory factor is price competition, and that the term "reasonable" should be read to mean "competitive," is understood from the primarily economic nature of the Act.

War and National Defense ⟸ 59

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; reasonableness of costs and profits. [7] In considering the reasonableness of a renegotiated contractor's profits compared to firms operating in competitive markets, the gathered data must identify the firms whose size, products and overall business operations were, in the time frame of the review period, sufficiently similar to the contractor's that they may be considered "comparable," the extent of that similarity, and the comparable firms' profits in that time frame. The data should disclose the full range or hierarchy of profits in the renegotiated contractor's industry with which the latter's profits may be compared to ascertain whether they are excessive, and if so, by how much. It is not sufficient that the comparison be made only between the contractor's profits and industry averages or medians. A range of industry profits, reflecting the varying efficiencies and risks of member firms, must be identified for comparative purposes.

War and National Defense ⟸ 59

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; reasonableness of costs and profits. [8] The renegotiation process may not consider, in making comparisons of profit levels within the contractor's industry, the earnings rates of firms not operating in competitive markets.

War and National Defense ⟸ 59

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; reasonableness of costs and profits. [9] In renegotiation, the comparability of firms and industries depends upon their similarity to the renegotiated contractor in such areas as the type and extent of risks undertaken and the entrepreneurial skills employed, and not solely and dogmatically upon the likeness of the product type. Although the subject garment was no doubt different from and more difficult to make than most other garments, it does not follow that the variant risks and skills involved cannot be taken into account in arriving at a reasonable profit figure.

War and National Defense ⟸ 59

1

Syllabus

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; reasonableness of costs and profits.

[10] No rule or principle says that the profit made on the highly efficient production for war of a good quality product in volume is excessive when it exceeds the contemporaneous statistical average profit of comparable industry, composed of good, bad and indifferent producers. The reasonable profit will differ from one firm to the next as the risks assumed differ and from one product to the next, as the manufacturing complexities differ, and as the manufacturer's efficiency varies. The projection of the renegotiated contractor's reasonable profit must take his efficiency into account and should not do so by guess or unarticulated opinion, but rather by reference to the profit of a similarly efficient compared manufacturer.

War and National Defense ⇦ 59

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; reasonableness of costs and profits.

[11] In determining the reasonableness of a renegotiated contractor's profits compared to firms operating in competitive markets, sales volume is an important factor; though the sales volumes of firms need not be identical for comparison to be possible, the closer they are to one another, the more likely is the accuracy of the comparison.

War and National Defense ⇦ 59

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; efficiency of contractor.

[12] The renegotiated contractor's ability to meet and even exceed production schedules, to produce a great volume of goods or services without enlarging its asset base or expanding its work force, and to decrease its controllable expenses, as well as its success in minimizing defects in its products, are significant indices of efficiency. Timeliness, heightened production, cost control and maintenance of quality, all are aspects of efficiency to be considered and assessed in the comparison of the renegotiated contractor and each comparable firm.

War and National Defense ⇦ 59

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; efficiency of contractor.

[13] Bearing on the relative efficiency of a renegotiated contractor is information on the reasonableness of its costs, for this information would show the competitiveness of its production and overhead expenses with such expenses of comparable contractors and with the prices that the market had to offer, as well as show the contractor's attempts to lower its costs over those experienced in previous production of the same item.

War and National Defense ⇦ 59

Syllabus

Renegotiation of contracts; redetermination of excessive profits; evidence; efficiency of contractor.

[14] Defendant's unsupported statement that plaintiff's efficiency was merely average will not prevail, where the renegotiated contractor has brought forth sufficient information about its efficiency for it to be considered the most efficient producer of its industry.

War and National Defense ⟸ 59

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; extent of risk assumed.

[15] Congress, in requiring consideration of the risks borne by the renegotiated contractor and comparable firms, recognized that one purpose of competitive profit is to compensate the entrepreneur for the risks of financial loss and business failure he assumed in bringing his product or service to the marketplace. While the statutory factor seeks to amass sufficient information to assure that all risks assumed will be identified and adequately compensated, being careful not to compensate one contractor at a higher rate than another for bearing the same risks, the contractor's assumption of risks greater than any comparable firm will require a greater compensation, other things being equal. The assessment of risk is a comparative exercise.

War and National Defense ⟸ 59

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; extent of risk assumed.

[16] Where the risks assumed by other firms are not known and therefore cannot be weighed relative to the risks undertaken by the renegotiated contractor, a barrier is raised to the use of those other firms' profit figures in determining a reasonable profit for the contractor.

War and National Defense ⟸ 59

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; extent of risk assumed.

[17] Where a risk is borne that is not compensated in any comparable firm's profits, it is nonetheless compensable by an upward adjustment of an otherwise reasonable profit figure for the risk-bearer, however, judgmental in nature that adjustment must be. Thus, where plaintiff suffered losses by reason of alienation of its established commercial accounts stemming directly from the pre-emptive termination of the accounts when plaintiff was legally obligated to accept the Government's "rated orders," plaintiff should be accorded consideration for this risk and compensated for the profits it lost on the commercial work sacrificed.

War and National Defense ⟸ 59

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; contribution to the defense effort.

[18] The "contribution to the defense effort" factor focuses attention on extraordinary actions of the renegotiated contractor, not

1

Syllabus

in keeping with his industry's normal commercial practices, but existing to the substantial benefit of the defense agencies' work. Where such actions aid that work by inventiveness or risk-taking or special accommodation, and are not compensated by consideration under the other statutory factors, Congress has provided under this factor that they be rewarded even though the market would not respond to them with a profit increase. This is done by raising the contractor's profit, as a matter of judgment, above an otherwise reasonable level.

War and National Defense ⟸ 59

Renegotiation of contracts; redetermination of excessive profits; comparable industry.

[19] While the use of profit figures of other firms revised by the Renegotiation Board pursuant to unilateral order or compromise is of questionable propriety in a de novo redetermination proceeding due to the court's lack of full knowledge of the information before the Board and of the adjustments it made in effecting settlements, the after-renegotiation figures are not totally lacking in probative value and should not be disregarded completely without strong reason where introduced by plaintiff.

War and National Defense ⟸ 59

Renegotiation of contracts; redetermination of excessive profits; accounting adjustments.

[20] Under Sec. 103(f) of the Renegotiation Act modification of a renegotiated contractor's accounting to bring about a clearer reflection of renegotiable costs is within the court's authority.

War and National Defense ⟸ 59

Renegotiation of contracts; redetermination of excessive profits; allowable deductions; depreciation and obsolescence.

[21] Items of cost are allowable in renegotiation which may be estimated as deductions under Ch. 1 of the Internal Revenue Code of 1954, as amended, and regulations thereunder, such as obsolescence of equipment and buildings.

War and National Defense ⟸ 59

Renegotiation of contracts; redetermination of excessive profits; generally.

[22] Renegotiation is not a rate-making proceeding, conducted before an administrative body vested with considerable discretion. This court seeks to base its redetermination of profit excessiveness upon hard evidence to preclude a foray into the realm of arbitrariness. Yet, the court is also bound to interpret and apply the Renegotiation Act in a manner consistent with the congressional purpose of remitting excessive profits to the public treasury.

War and National Defense ⟸ 59

Theodore M. Kostos, attorney of record, for plaintiff. *Stassen Kostos and Mason*, of counsel.

Raymond B. Benzinger, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before LARAMORE, *Senior Judge*, DAVIS and BENNETT, *Judges*.

BENNETT, *Judge*, delivered the opinion of the court:

This renegotiation case comes before the court on plaintiff's and defendant's exceptions to findings of fact* and the opinion issued on July 25, 1975, by Trial Judge George Willi, in accordance with Rule 134(h), in which he held that plaintiff realized excessive profits of $711,231. Plaintiff, Major Coat Company, Inc.,[1] brought this action seeking a redetermination of a unilateral order of the Renegotiation Board (the board) that it realized $740,760 in excessive profits, before federal income taxes, out of total net profits of $1,079,962 for its fiscal year ended January 31, 1968 (FY 1968). Plaintiff now prays for a judgment that it earned no excessive profits within the meaning of section 103(e) of the Renegotiation Act of 1951 (the Act), 50 U.S.C. APP. § 1213(e) (1970), while defendant presses for a ruling that the extent of the excess was even greater than that found by the board, or about $900,000. Upon careful review of the record we are unable to agree with either the board or the trial judge, and find that plaintiff received excessive profits of $560,000. The facts and reasons leading to this conclusion are fully set out hereafter. The suit is brought under section 108 of the Act, as amended, 50 U.S.C. APP. § 1218 (Supp. V, 1975), which provides that judicial review of the board order shall occur in a de novo proceeding. This provision is understood to require not only a full, due process trial to develop the facts in the case entirely independent of what the board may have done, but also that defendant, in seeking the return of monies paid out by it, bear the burden of persuading the court by a preponderance of the evidence that the renegotiated contractor realized excessive profits and that the extent of that excess

*Whereas the court adopts the trial judge's findings of fact as set forth in his recommended decision they are not printed herein since such facts as are necessary to the decision are printed in this opinion.

[1] Renegotiated together with its sister holding company, Major Clothing Co., as a "consolidated group." *See* 50 U.S.C. APP. § 1215(a) (1970).

was as defendant claims. *Lykes Bros. S.S. Co.* v. *United States*, 198 Ct. Cl. 312, 327, 330, 459 F. 2d 1393, 1401–403 (1972) (hereafter *Lykes Bros.*).

Congress set forth in the Renegotiation Act the means of determining the existence and extent of excessive profits in a series of guidelines known as the "statutory factors." Section 103(e). These describe the essentially comparative process by which a reasonable level of profit is determined. The factors requiring consideration of the character of the renegotiated contractor's business, the net worth and capital employed, and the reasonableness of his costs and profits outline the information that must be assembled in order to construct a reasonably accurate comparison of the contractor's performance in the fiscal year under renegotiation (the review year) with the performance of similar firms. This group of factors provides the means of identifying the firms (including plaintiff itself in the past years) sufficiently similar to plaintiff that they may be considered part of plaintiff's "industry," and of determining the pricing policy and profit picture of that industry (or industries). Three other statutory factors focus attention on the contractor's efficiency, the business risks he assumed, and his contribution to the defense effort, to ascertain how well the renegotiated contractor fared against other firms in his industry on points affecting profitability in a competitive market. This analysis answers "[a] most important question in renegotiation," which is "'* * * where the contractor in a defense industry belongs in the hierarchy of profit returns of industry as a whole and the reason for his being placed in that particular position.'" *Aero Spacelines, Inc.* v. *United States*, 208 Ct. Cl. 704, 730, 530 F. 2d 324, 340 (1976).

(1) *Character of Business.* Section 103(e)(5) of the Act provides that a determination of excessive profits must take into consideration the "[c]haracter of [the renegotiated contractor's] business, including source and nature of materials, complexity of manufacturing technique, character and extent of subcontracting, and rate of turn-over." This factor requires the assembly of basic information about the renegotiated contractor's total operation during the review year, laying the foundation for a later, meaningful comparison of the

contractor's review year business and performance with that of firms functioning in a competitive market. The factor focuses attention, *inter alia*, on the kind of renegotiable product made, the nature of the manufacturing operation and the difficulties inherent in the product's manufacture, the sources of the materials from which it was produced, the kind of product that the renegotiated contractor marketed commercially (if any) during the review year or in preceding years, the difficulty of making that product relative to the renegotiable item, and the state of the commercial market in which the contractor had operated or was operating. Most of our commentary under this factor relies heavily on the opinion of the trial judge.

Plaintiff is a small, family-owned enterprise that began operation in 1945 as a custom manufacturer of men's clothing, primarily coats, jackets, and trousers, which it produced from fabrics supplied by commercial customers in what was known as a "cut, make, and trim" operation. Nourished by the personal energy and initiative of its owners, three brothers, the venture grew and generally prospered until, by 1960, the business was conducted in newly constructed and enlarged facilities located just outside Bridgeton, New Jersey. By then the brothers had established profitable working relationships with McGregor-Doniger Co. (McGregor) and Londontown, Inc., marketer of London Fog raincoats. While the requirements of these two customers were seasonal in nature, they dovetailed to provide plaintiff with full utilization of its productive facilities on nearly a year-round basis. With this substantial and sustained patronage, plaintiff's business continued to grow. Earnings were modest, in keeping with the very limited capital available to the brothers, yet progress was sufficient to qualify plaintiff for a $100,000 loan from the Small Business Administration and to enable it punctually to curtail and ultimately to liquidate that obligation in 1966.

Beginning in 1964, the clothing industry experienced a general upturn in sales and earnings that continued substantially unabated until the last quarter of 1969. Plaintiff's revenues from McGregor and Londontown increased accordingly, and in its fiscal year ended January 31, 1966, it showed a

combined[2] net profit of $26,000, a 2.9-percent return on receipts of approximately $900,000. Prospects for plaintiff's future with McGregor and Londontown were predictably good. This was generally the climate in which plaintiff found itself on the eve of its first major involvement with the Government as a contract supplier of military clothing.

In May 1966 the Army was in urgent need of 400,000 cotton sateen trench coats known as the OG–107. Because the clothing industry generally was operating at peak production at the time, military buyers found that they were unable to attract qualified suppliers as interested bidders for this item. It was therefore decided that this essential procurement should be effected by the issuance of a so-called "rated order." That emergency device, authorized by a provision of the Defense Production Act of 1950, 50 U.S.C. APP. § 2071 (1970), and regulations issued thereunder, legally obligated an operator in plaintiff's circumstances to accept a contract to produce an article such as the OG–107 and to do so without regard to the prejudicial effect on its existing relations with commercial customers. Such an order was issued to plaintiff on May 16, 1966, for 52,200 OG–107 coats. Plaintiff resisted the order because filling it meant the complete sacrifice of sales to its valued customer, McGregor, but when it was given to understand by the procurement authorities that it could be legally compelled to fill the order if it did not agree to negotiate contract terms voluntarily, it reluctantly entered into such negotiations. It incurred the serious disapproval of McGregor when it advised that it could not service the account until it had filled the Government's order. This occurred at a time when McGregor had substantial outstanding sales commitments that it had assumed in reliance on the future production that it anticipated from plaintiff. McGregor ultimately had no choice but to accept this development and adjust to it as best it could. In doing so, however, it informed plaintiff that the incident would be remembered when commercial conditions changed from a seller's to a buyer's market. McGregor ultimately made good on that pledge—to plaintiff's considerable detriment.

[2] Together with Major Clothing Co.

Plaintiff satisfactorily and punctually completed its rated order work on the OG–107 in the fall of 1966. Although its overall capacity was such that it did not have to turn away the Londontown account while it was performing the OG–107 work, its commercial business (*i.e.*, nondefense or nonrenegotiable business) in its fiscal year ended January 31, 1967 (FY 1967), resulted in a loss of $60,961.14. The trial judge found that this loss was attributable to the disruption and dislocation caused by the enforced intervention of production of the OG–107.

On October 7, 1966, just as plaintiff had finished its OG–107 work, it was issued another rated order by the Army, this time for a first procurement of a dress overcoat. This new item, a top-quality, wool-gabardine coat, extremely complex and demanding in construction, was designated the AG–44, and it was plaintiff's work on it that was the source of the renegotiable revenues that are the subject of this proceeding.

Because of the novelty and complexity presented by the AG–44, the activities and negotiations that occurred between issuance of the rated order and consummation of a formal contract included a plant survey by a representative of the Defense Personnel Support Center. The representative concluded that plaintiff could meet the Government's needs provided that: (1) it promptly terminate the remainder of its civilian business, *i.e.*, the Londontown account, (2) it take on an additional quantity of personnel skilled in various particular garment-making functions, and (3) it purchase a specified assortment of special-purpose sewing equipment. Meanwhile, plaintiff decided to accept an order for the AG–44. Though it realized that such acceptance would require the interruption, if not the permanent loss, of its valued relationship with Londontown, it concluded that since it could not then reinstate the McGregor business and could presumably be compelled in any event to accept some AG–44 business, and because its experience in manufacturing the OG–107 had been profitable and otherwise satisfactory, it might as well appropriate its entire resources and efforts to the performance of Government work.

Plaintiff took the steps specified by the defense agency representative, engendering essentially the same hostile reaction

in Londontown that it earlier had in McGregor, incurring substantial personnel recruitment and training costs, and expending some $28,000 for specialized equipment, almost all of which was useful only for making the AG–44. On November 3, 1966, plaintiff was awarded a fixed-price contract for 45,000 AG–44 coats, subject to a Government option to purchase an additional 50 percent at a somewhat reduced figure.

While production on the AG–44 was fully under way, in September of 1967, New Jersey state authorities threatened to curtail plaintiff's operations unless it agreed to take prompt action to provide substantial additional sanitary facilities to accommodate its expanded work force, which rose from 230 workers on the OG–107 contract to 350 workers on the AG–44. In order not to interfere with AG–44 production, plaintiff complied and undertook the construction of a new building on its premises. The building, completed in early 1968, cost $107,000 and has at all times since been largely extraneous to plaintiff's needs. During FY 1968, plaintiff commenced and completed all of its AG–44 work, delivering 68,109 coats under its prime contracts—the approximate volume of the original contract plus the 50-percent option quantity—and 10,010 coats under a subcontract that it obtained later in the year from L. W. Foster Sportswear Co., Inc. Plaintiff, however, subcontracted none of its AG–44 work.

Dr. William F. E. Long, called by defendant as its expert witness on economic matters, testified that plaintiff should be accorded no consideration for the "complexity of [its] manufacturing technique," in the statutory factor's words, because in his opinion plaintiff's manufacturing operation was not complex. It was Dr. Long's view that a manufacturing process is complex to the degree that the end-product yield from a given quantity of raw material cannot accurately be forecast. He expressly rejected the notion that the statutory phrase "complexity of manufacturing technique" relates in any way to the intrinsic complexity of the end item involved. The evidence shows, as the trial judge found, that the AG–44 coat was very complex in construction and design and that its production consequently required a commensurate degree of skill and painstaking care. The coat was acknowledged by qualified and experienced Government

procurement officials, appearing as witnesses, to be among the most complicated garments ever procured by the military. The trial judge correctly decided to accord plaintiff consideration for the complexities involved in the coat's manufacture, even though the coat's production showed no erraticism in yield. Defendant's expert witness, as the trial judge noted, simply misapprehended the meaning of the statutory phrase, which is far less restrictive than he thought. The board's regulation commenting on the character-of-business factor notes in pertinent part: "The manufacturing contribution will vary with the nature of the product and the degree of skill and precision required in the work performed by the contractor." 32 C.F.R. § 1460.14(b)(1) (1968). Intrinsic complexity of the end item and the degree of skill and care needed to produce it are the subjects to be considered under the subfactor of manufacturing complexity.

Having resolved to reject Dr. Long's reading of the subfactor and to credit plaintiff with "favorable consideration on complexity grounds," the trial judge went on to decline assigning a dollar value to that "favorable consideration," noting that the record offered no guidance as to what that value should be. He concluded that recognition of the complexity of manufacturing technique in plaintiff's operation could only serve to reinforce other determinations favorable to plaintiff made in his opinion. Plaintiff has objected to this approach, arguing that the purpose of the statute in according favorable consideration where this is merited was frustrated by what the trial judge did. We think that the trial judge is more nearly correct here than is plaintiff, for consideration of production complexity is in reality the assessment and comparison of "[t]he relative complexity of the manufacturing technique," as the board states in the regulation just cited. The term "relative" is the key: a comparison of degrees of manufacturing complexity is anticipated, between plaintiff and those firms against whose profit levels plaintiff's will be measured, to ascertain that plaintiff's performance will not be compared with that of a firm not encumbered by similar complications, or at least that plaintiff will not be so compared without making appropriate adjustments. The assessment of the degree of production com-

plexity is not of itself a vehicle for granting rewards or withholding them, but simply lays the foundation for a later comparison. There can be no meaning to a finding that one firm is possessed of production line complexities, or that another has none, for there are no absolutes here; the only meaning is that which surfaces in the final comparison of the assessed degrees of complexity among the firms in plaintiff's "industry." Accordingly, the trial judge properly resisted the invitation to translate any finding on the complexity of plaintiff's manufacturing technique into a monetary credit for plaintiff. His findings that the process of manufacturing the AG–44 coat was complicated and required a high degree of skill and care to accomplish with success, and that the coat itself was one of the most complex garments ever procured for military use, must be considered in comparing plaintiff's work and profits with the work and profits of other firms, in the discussion on the "reasonableness of costs and profits," *infra.*

Plaintiff's renegotiable contracts obligated it to construct the AG–44 coats out of fabrics furnished by the Government (so-called Government-furnished property, or GFP) under a standard Government contract clause, entitled GFP Bailment System. A board regulation advises:

> (2) A contractor who uses customer-furnished materials generally is not entitled to as large a dollar profit as the dollar profit to which such contractor would have been entitled had it furnished the materials itself. In the latter case, the contractor would have expended effort in finding or acquiring the materials, would have invested capital in the materials and would have assumed the risks of obsolescence, spoilage, or other loss inherent in owning such materials. * * *. [32 C.F.R. § 1460.14(b)(2) (1968).]

Defendant contends that the value of the GFP, an administratively determined figure, used in the manufacture of the AG–44 coats must be excluded in stating the dollar amount of plaintiff's renegotiable sales and in calculating its renegotiable profit as a percentage of sales, in order to give effect to the quoted regulation.

The trial judge took the view, mostly contrary to defendant, that the value of GFP should be included in figuring

the profit percentage, making an adjustment for the fact that plaintiff incurred no inventory financing cost for the fabrics it acquired under the bailment system. Apparently, the trial judge agreed with the notion that a firm may make a profit on the materials it purchases as well as on the manufacturing services it performs, and that the board's regulation simply advised discounting the firm's profit to the extent that it did not bear the risks and responsibilities of an outright purchaser of materials. This is plaintiff's view, though plaintiff does not agree with the trial judge's exclusion of one-fourth of the GFP value. It argues instead that the total value must be included in the sales figure and the percentage profit calculations, pointing out that neither party submitted evidence directed toward, or contended for, the partial exclusion of GFP value to approximate the inventory financing expense said to have been saved.

To resolve the foregoing controversy, we must determine whether a GFP "bailee" bore virtually the same burdens and derived the same benefits in the handling of the GFP as would a purchaser of raw materials. A negligible difference between the two requires that the GFP be accounted for in the same manner as materials purchased. This is the thrust of the board's regulation and of the Tax Court's opinion in *Winfield Mfg. Co.* v. *Renegotiation Bd.*, 57 T.C. 439, 450–52 (1971).

The GFP bailment system under which plaintiff operated supplied the contractor with needed materials without requiring a cash outlay. Thus, the contractor was relieved of both the necessity and the opportunity of locating a component supply source and arranging for the payment of the supplier. These characteristics were common to both the bailment system and the so-called "free-issue" system, the latter used until 1957. Under the free-issue system, discussed in *Ellis Coat Co.* v. *Secretary of War*, 9 T.C. 1004, 1016 (1947), the Government specified the amount of GFP that could be used in each end-item contract that involved GFP. So long as the contractor held his total GFP consumption within the specified tolerance, the quantity of GFP that he used had no impact on the profits he realized from performance of the contract. Even as the contractor had little incentive to econ-

omize on GFP usage, the Government bore the expense of voluminous record-keeping on the GFP as well as of the maintenance of a large force of field personnel to supervise the return of unused GFP upon the completion of contracts. The free-issue system, generally regarded as inefficient and unsatisfactory, was eventually abandoned in favor of the form of bailment of GFP under which plaintiff worked in the review year.

The central feature of the bailment system was that of placing squarely on the contractor the entire risk of end-item yield from GFP. Thus, the contractor assumed all the economic benefit or burden resulting from the efficiency with which he utilized GFP in his manufacturing process. The contract no longer referred to an amount of GFP that could be consumed, but rather, the invitation for bids (made a part of the contract) described the physical character of the GFP, a price per unit (such as per yard) of GFP, and a single dollar figure that would be deducted, for payment purposes, from the contract price of each delivered end item. The contractor was responsible for determining prior to contract award the quantity of GFP projected for consumption during performance, and for including this in his contract price calculation; though he would take the Government's GFP dollar figure per end item into account in making this final price calculation, he could not rely on its accuracy, as he was warned in the invitation.

As the GFP was issued to the contractor after award of the contract, the Government debited a material account established for him at the price per unit times the number of units issued, and he in turn transported the GFP to his worksite, at his own expense and under his own arrangements. While the GFP remained in his custody, the contractor bore the entire risk of loss on it, the Government maintaining only a security title in the goods. Upon delivery and acceptance of contract items, the Government credited the contractor's material account at the agreed dollar figure per end item. At the conclusion of performance on a contract, the contractor was charged with any debit balance in the material account, or alternatively was paid for any credit balance. Again, the end-item dollar figure was administratively set

and did not necessarily reflect the actual GFP consumption per item, and so the usage of more GFP than projected by the contractor in calculating his total contract price could likely reduce or destroy his estimated profit margin. For purposes of establishing the final material account balance, the contractor returned the GFP issued but not used; the bailment system terms required this return, and placed the arrangement and expense of it upon the contractor. However, the contract permitted neither return of nor credit for the GFP incorporated into unacceptable end items, so-called "irreparable rejects," or incorporated in work-in-process upon a valid default termination.

The foregoing shows an allocation of benefits and burdens tantamount to those assumed by one who commercially purchases the materials he uses in manufacturing goods. The allocation contrasts sharply with the free-issue system's distribution of risks and benefits, meaning that we cannot rely on the holding in the free-issue *Ellis Coat Co.* case, *supra*, excluding the value of GFP from the sales base, for guidance in determining the proper mode of accounting for GFP under the bailment system. In addition to the burdens normally assumed by a materials purchaser, the bailment system placed upon the contractor the obligation of accepting up to 10 percent of the GFP in "short pieces" without compensation for any extra costs entailed in working with them, along with the duties of storing and accounting for the GFP separately from the rest of his inventory and of allowing the Government access to it at certain times.

Defendant would have us weigh against the above facts several points which it says favored the contractor, supposedly subjecting him to less risk and expense than would be the case with a purchaser of materials. Under the bailment system's terms, according to defendant, plaintiff "was insulated from the vagaries of the marketplace in the acquisition of basic fabric," presumably meaning that plaintiff could depend upon the Government as a ready and sufficient source of supply, and that the material price was effectively guaranteed not to rise between the date that price negotiations were concluded and the time that commercial supply commitments (were they to be used) could be secured. The protection

provided against a component price rise would undoubtedly be advantageous to the contractor, particularly in a tight materials market, and in the same kind of market a reliable source of supply would likewise favor the contractor considerably. However, it is not apparent from the record that plaintiff would have experienced problems in obtaining a steady supply of needed fabrics, particularly if the Government had remained out of the material supply market, or would have incurred more than negligible costs in locating that supply. Moreover, that dependence upon a sole source supplier, whether the Government or a commercial firm, is not necessarily an advantageous circumstance to be in, especially when disputes arise over the timeliness or quality of supply, for the contractor does not then have the opportunity to seek out an alternative supplier. Defendant must adduce proof, which it has not done, rather than make conjectures, in order to establish an advantage here. We should not rush to find a significant advantage in the dependability of the Government as a supply source.

The bailment system also favored the contractor, according to defendant, because the contractor took possession of the materials without having to pay cash for them. The trial judge agreed with defendant that the contractor received an advantage in being relieved of inventory financing costs on the fabrics supplied under the system. However, this reasoning, while attractive on the surface, finds no support in the facts of this case. On numerous occasions during the trial, plaintiff's officers and various of its suppliers testified that it was common practice in plaintiff's industry for suppliers who sold component materials to plaintiff and like operators to await payment for those materials until after the contractor was itself paid for the end items it delivered. This was as true for Government contracts as for commercial orders, even though the former at times required longer waiting periods between component shipment and receipt of payment therefor. When a bank or factor entered the picture, as assignee of the Government contract proceeds, the material suppliers still waited for payment until finished goods were delivered to and paid for by the Government.

The trial judge did not find to the contrary, and again it must be remembered, it is defendant's burden to bring forward sufficient proof to persuade the court, by a preponderance of the evidence, that plaintiff did derive some advantage from the bailment system in the nature of an interest-free loan. Defendant did not do this, but left plaintiff's showing on extension of credit for the materials it bought virtually unrebutted, relying solely on the theory of advantage constructed from the operation of the bailment system and its assumptions about credit for materials in plaintiff's industry. Defendant also did not suggest any dollar figure approximating the alleged financing cost forgiveness; the deduction used by the trial judge was his own invention. The trial judge's finding of fact that plaintiff derived interest-free credit for its inventory financing under the bailment system beyond what it otherwise could have obtained as a purchaser of materials, and that exclusion of one-quarter of the total GFP value for the review year from the net renegotiable sales figure was appropriate to compensate for this advantage, must be disallowed as indulging in assumptions not supported in the record and against the weight of the evidence. Plaintiff has overcome the presumption of correctness that normally attaches to the finding of a trial judge under our Rule 147(b) by making the showing required in *Bonnar* v. *United States*, 194 Ct. Cl. 103, 146–47, 438 F. 2d 540, 563 (1971), quoting *Davis* v. *United States*, 164 Ct. Cl. 612, 616–17 (1964). On the facts in this case, it cannot be said that any advantage accrued to plaintiff by virtue of the fact that the bailment system did not charge plaintiff a fee for financing part of its inventory.

On balance, we conclude that, on the facts of this case, the value of the GFP should be taken into the net renegotiable sales figure and included in calculations of renegotiable profit as a percentage of sales, to place plaintiff in parity with a manufacturer that purchases all the materials it uses. This aligns with the board's regulation, cited at the outset of this discussion. Under the bailment system, the contractor who works with GFP bears at least as many risks and burdens as the manufacturer who uses only materials he has purchased. Defendant cites *Winfield Mfg. Co.* v. *Renegotia-*

tion Bd., *supra*, in support of a contrary conclusion, and indeed, the Tax Court did reach a result in that case different from ours as regards the costs of locating and financing the acquisition of materials. The court concluded that the GFP recipient did not assume burdens of finding and financing inventory as great as those borne by a materials purchaser. However, the plaintiff in *Winfield* had the same burden of proof, under the Tax Court's rules, as does defendant in this case, *see Lykes Bros.*, *supra*, and so it is not surprising that a failure of proof on exactly the same point leads to an opposite result. We view *Winfield* as the product of the plaintiff's failure there to elicit sufficient proof to persuade the court that its material acquisition costs would not have been greater in the commercial marketplace than under the bailment system, just as we reach our conclusion in part because defendant has not established that the acquisition costs would have been greater. To the extent this does not account for the differing results in the two cases, we simply state that we believe our analysis of the allocation of benefits and burdens under the bailment system to be the correct one, on the facts presented to us in this record.

It should not be understood, from the above discussion, that inclusion of the GFP value is now the invariable rule for the renegotiated contractor's net renegotiable sales and percentage profit figures no matter how the figures with which they are later to be compared are constituted. Rather, the rule is that, in making comparisons between plaintiff and other firms, materials purchased or considered as if purchased by plaintiff (including the GFP) must be accounted for in the same manner as materials purchased or properly treated as purchased by the compared firms. This does no more than admit that a contractor may realize a profit on materials he has purchased for use in making his products. If, for example, plaintiff is compared with a firm, in the analysis under the statutory factor "reasonableness of costs and profits," that deals solely with commercial customers and that purchases all of the components that it includes in its products, then the value of the GFP used by plaintiff must be included in its sales figure. And where the comparison is with a fellow AG–44 coat manufacturer, whose GFP value is excluded in stating the renegotiable sales figure, plaintiff cannot properly

include the GFP value in its figure. If, however, plaintiff is compared with a firm that excludes the value of its materials since it cannot be considered a purchaser of the materials, such as an operator who relies on the customer to supply the materials and likewise to assume all responsibility therefor, plaintiff's net renegotiable sales must nonetheless include the GFP value. This is true because plaintiff *is* considered a materials purchaser, and only when a compared firm that is also viewed as a purchaser excludes the value of its materials can plaintiff properly do so.

Having set forth the environment in which plaintiff operated in the year under review, we move on to consider the remaining statutory factors.

(2) *Net Worth and Capital Employed.* Section 103(e)(2) of the Act directs that a determination of excessive profits take into account "[t]he net worth [of the renegotiated contractor], with particular regard to the amount and source of public and private capital employed." Neither the parties nor the trial judge considered in much depth the data involved under this factor, aside from the role of the GFP bailment system in plaintiff's manufacturing operation, already discussed above in detail. Apart from that system, plaintiff provided, by equity funding and some borrowing, all the capital used in running its business. Certainly, if the GFP be viewed as a contribution by the Government to plaintiff's working capital—a dubious assumption in light of the discussion above on inventory financing—the risks and burdens that the bailment system's terms placed on plaintiff hardly justify saying that the Government made the contribution without receiving anything in return. Though a contractor's heavy reliance on public capital provided for his use without charge argues against his receipt of as great a profit as a contractor making a similar product in a similar volume using private capital, as it is one of the purposes of the net worth factor to point out, *see* 32 C.F.R. § 1460.11(b)(4) (1968), this is not a case of such reliance. Since net worth and capital employed were not further considered by either party or by the trial judge, in measuring normal earnings or otherwise, we will not treat of the matter hereafter.

(3) *Reasonableness of Costs and Profits.* Determination of the excessiveness of profits must also take into consideration

the "[r]easonableness of costs and profits, with particular regard to volume of production, normal earnings, and comparison of war and peacetime products." Section 103(e)(1). The Act requires that the reasonableness of profits [3] be considered because, unless it is decided that the renegotiable profits were not competitively set, and that they rose substantially above the competitively fixed profits of comparable firms, there can be no finding that excessive profits were realized. That the touchstone of this statutory factor is price competition, and that its term "reasonable" should be read to mean "competitive," is understood from the primarily economic nature of the Act.

Statutory renegotiation stems from the premise that "accurate pricing and the control of contractors' profits cannot be achieved during a build-up of production for defense of war." *Mason & Hanger-Silas Mason Co.* v. *United States*, 207 Ct. Cl. 106, 115, 518 F. 2d 1341, 1346–347 (1975). The careful cost analysis and forecasting that usually accompanies negotiated procurement sometimes falters in time of war, as demand for various goods and services suddenly rises to a level that outstrips industry capacity and overwhelms procuring agents. If the inordinately high demand is not sufficient to create a seller's market in the extreme, then the knowledge that the demand is short-term and will just as suddenly fall off surely accomplishes the task. Of course, pressed by the exigencies of war, the Government is unlikely to refrain from purchasing needed supplies and work even though the price is suspiciously and distastefully high. The result, not surprisingly, is the evaporation of price competition, and the consummation of sales to the defense agencies much higher in price than a competitive market would have allowed. The Government thus relies upon the expedient of renegotiation to recoup the price differential, *Mason & Hanger-Silas Mason Co.* v. *United States*, *supra*. The defense demand will neither wait, nor will it provide the incentive, for enough new productive capacity to be opened up (because of the attraction of the profits) "to drive prices down and eliminate 'abnormal'

[3] The "reasonableness of costs" is more concerned with the assessment of relative efficiency, *see* 32 C.F.R. § 1460.10(b)(1) (1968), and so will be discussed under the efficiency factor, *infra*.

profits," thus serving to "preclude continuing and excessive profits" as typically done in the competitive marketplace. W. Baumol, *Models of Economic Competition*, in PRICE THEORY 288, 299 (H. Townsend ed. 1971). Renegotiation merely seeks to reconstruct the competitive price to the Government, and the competitive profit for the contractor, that negotiation would have produced absent the suddenness of the wartime demand on the marketplace.

By directing inquiry into the reasonableness of profits, the Act says in effect that a profit figure cannot stand if it was not competitively determined. Thus, the renegotiation process must disregard the renegotiated contractor's profits where these have not been competitively fixed, and as well may not consider, in making comparisons of profit levels within the contractor's industry, the earnings rates of firms not operating in competitive markets. When the statutory factor prescribes that profit reasonableness is to be weighed by paying regard to the size and change in production volume, the typical or "normal" earnings in the contractor's history and industry, and the likeness of renegotiable and commercially marketed products, it not only confirms the economic, competitive thrust of the factor, but also admits that deciding whether competition exists is not always without difficulties. *See A. C. Ball Co.* v. *United States*, 209 Ct. Cl. 223, 260–62, 531 F. 2d 993, 1014–015 (1976). By assembling data on production volume, normal earnings, and product similarity, the renegotiator can determine if the prices and profits of the renegotiated contractor, and of other firms with which he is compared, were set by adequate competition. For example, the maintenance or rise of the customary rate of return over a vastly expanded volume of production may well show, absent the introduction of risks not previously compensated, that the producer is not subject to the restraints of price competition, *see Mason & Hanger-Silas Mason Co.* v. *United States*, *supra*, 207 Ct. Cl. at 139–43, 518 F. 2d at 1361–363, whereas considerable difference in manufacturing complexity between a renegotiable product and a commercial product cautions against drawing inferences about competition from a close comparison of their respective earnings levels. By thus analyzing the performance records of the renegotiated con-

tractor and of compared firms, one can learn whether their profits may be sustained or used in a comparison because they are competitive or "reasonable," or whether they should be rejected because noncompetitive.

Beyond the task of focusing attention on the competitive nature of the profit figures, the profit reasonableness factor performs a second key function in renegotiation. In this role, the factor directs that the gathering of data identify (a) the firms whose size, products, and overall business operations were, in the time frame of the review period, sufficiently similar to plaintiff's that they may be considered "comparable," (b) the extent of that similarity, and (c) the comparable firms' profits in that time frame. The gathered data should disclose the full range or hierarchy of profits in the renegotiated contractor's industry, with which plaintiff's profits may be compared to ascertain whether they are excessive, and if so, by how much. The statutory factor directs that such a comparison be made as part of the renegotiation process when it says that "normal" profits should be taken into account, meaning in part that the renegotiated contractor's profits should be matched with the profits of similar firms known to be functioning in a competitive market, to measure the existence and extent, if any, of the contractor's aberration. "A reasonable profit can be established only on a comparative basis because it is impossible to say what a particular product or service is intrinsically worth." *Aero Spacelines, Inc.* v. *United States*, *supra*, 208 Ct. Cl. at 753, 530 F. 2d at 353–54. It is not sufficient, however, that the comparison be made only between the contractor's profits and industry averages or medians—a range of industry profits, reflecting the varying efficiencies and risks of member firms, must be identified for comparative purposes. In *A. C. Ball Co.* v. *United States*, *supra*, 209 Ct. Cl. at 259, 263–66, 531 F. 2d at 1013, 1016–017, we focused upon a profit range, not a mid-range figure, to measure the excessiveness of the plaintiff's earnings. The importance of disclosure of the full range, including the highest and lowest profits in the industry, is apparent from that case, in which we found that the plaintiff, though functioning in a market where price competition was not wholly adequate, could earn a reasonable profit at the very top industry rate, partly because the Government

failed to show that a lower profit was in order, and partly because the plaintiff demonstrated that it performed with great efficiency while assuming many risks.

The seemingly diverse functions of the statutory factor, ascertaining the state of competition and constructing a comparative profit structure, are reconciled at this point—another firm's profit level cannot be considered reasonable, and therefore be useful in a comparison to determine excessiveness, where it was not itself competitively set. A practice of measuring the reasonableness of a contractor's profits against the noncompetitive profits of others is too futile to warrant condemnation. This is not to say, of course, that every noncompetitive profit contains an excessive portion, for a contractor need not exploit his market power to the fullest even though the impact of defense demand on his industry gives him that power. Only after all the statutory factors have been considered, *A. C. Ball Co.* v. *United States*, *supra*, 209 Ct. Cl. at 232–33, 531 F. 2d at 998, the contractor has been "located" on the industry profit hierarchy, and the profit reasonable for him at that point on the hierarchy is measured against his actual earnings, can it be known whether any part of his profit was excessive.

The record shows that there was little or no price competition among the producers of OG–107 and AG–44 coats in FY 1967 and FY 1968. The trial judge found that a strong commercial market existed in the clothing industry during this period, which meant that most of the productive capacity in the industry was already committed when defense procurement officials first sought to place their orders for the coats. In turn, this meant that these officials, to place the orders at all let alone obtain priority production, were forced to resort to the issuance of rated orders. The great bulk of the AG–44 coats delivered in FY 1968 were produced under rated orders. Though a negotiation would follow the placement of the order, to fix the contract terms and price, procurement officials would have to agree at least to meet the contractor's regularly established price or terms of sale or payment in order to maintain the legally compelling nature of the order under the Defense Production Act. This situation was far removed, indeed, from procurement by competitive bidding. Rather, it is reminiscent of the state of competition we found

in *A. C. Ball Co.* v. *United States*, *supra*, 209 Ct. Cl. at 260, 531 F. 2d at 1014, though without even the indicia of competition present there:

> The contention that procurement for the Vietnam war caused a decline in competition in 1967, is not, however, so readily to be dismissed. The year under review was a period of greatly increased military procurement for the war in Southeast Asia, * * *.
>
> With the increase in Government procurement for war it was inevitable that there would be fewer bids or bids at higher prices by contractors already busy to capacity and beset by wartime scarcities of labor, materials and shop capacity. As procurement expanded, competition waned and prices and margins of profit necessarily rose. Profits from this source are the objective of the Renegotiation Act, * * *.

In these circumstances, it is not to be assumed that plaintiff's earnings in FY 1967 and FY 1968, or those of other military coat manufacturers who themselves received or whose market was influenced by rated orders, were competitively determined. The potential for excessive profit-taking existed in the marketplace for OG–107 and AG–44 coats in the review year and the year preceding it.

Both parties brought forth data on the firms and their profits with which plaintiff and its review year renegotiable profits could properly be compared. Unfortunately, the data of neither side is entirely satisfactory for the construction of a comparative profit hierarchy. Though not mentioned in the trial judge's opinion, plaintiff's evidence showed that it earned a 15-percent profit on all its sales in FY 1967, covering both commercial and renegotiable work and including GFP, and that the six other firms which both manufactured AG–44 coats during the review year and were subjected to review by the board earned an average return on renegotiable sales (excluding the value of GFP, according to board practice) of 19.63 percent before renegotiation. Its evidence further showed that three of these firms, the ones which the board required to make refunds, were permitted to retain profits of 12.8 percent, 13.2 percent, and 25.1 percent of sales. In its reply brief, plaintiff forewent reliance on the FY 1967 profit figure, claiming instead that its past earnings were not truly

comparable to those of the review year due to the differences in the products manufactured. It is of more than passing interest that this change in position occurred after defendant's brief pointed out that the 15-percent figure was composed of a commercial loss coupled with a 46-percent profit on renegotiable work that was not adjusted by the board because a statutory floor forbade lowering plaintiff's renegotiable sales receipts below $1 million. *See* § 105(f)(1), 50 U.S.C. APP. § 1215(f)(1) (1970). The demise of the argument based on the FY 1967 figure is just as well, for the derivation of the renegotiable profit from sales not competitively priced, but based on a rated order, make the figure of little or no use for purposes of constructing comparisons to determine profit excessiveness.

Plaintiff has not, however, retreated from its position that the profits of the other AG–44 producers reviewed by the board, and their profits alone (see discussion in this section, below), should be compared with plaintiff's to assess the reasonableness of the latter. It is not clear on the record how plaintiff arrived at the 19.63-percent calculation. But it is certain that most of the firms whose profits underlie that calculation earned those profits producing AG–44 coats under rated orders, and that the others did so in the same tight market. Just as in the case of the FY 1967 profit figure in plaintiff's own business, the 19+ percent average profit is of practically no help in constructing a picture of reasonable returns with which to compare plaintiff's review year earnings, for it cannot be said that it derived from competitively priced sales. Further, the calculation yields only an average figure, which is of limited utility for the reasons stated below in the discussion of the defendant's comparative profit figures. The trial judge did not err in disregarding this average profit calculation.

Defendant, speaking through its expert witness, Dr. Long, presented evidence and an analysis showing, in Dr. Long's opinion, that $900,000 of plaintiff's review year profit was excessive. The witness focused, not on plaintiff's prior earnings history, which he apparently considered abnormal, but on profits of other firms that he thought comparable to plaintiff, earned in or near the review period. Dr. Long chose

Standard Industrial Classification (SIC) Nos. 2310 and 2311 as the prime indicators of the profit figures that could properly be compared with plaintiff's earnings. The trial judge correctly found that these two categories, which are practically identical [4] save in respects not relevant here and which encompass some 2,700 manufacturers of men's and boy's suits, coats, and overcoats, included the firms most similar to plaintiff in products and manufacturing operations for present comparative purposes. Defendant's expert then reviewed various profit statistics available in defendant's documentary evidence. According to the trial judge's findings, the figures which the expert singled out were: 1.55-percent median after-tax profit expressed as a percentage of net sales, reported in a Dun & Bradstreet survey of the 1967 earnings of 125 firms that accounted for more than 50 percent of the total domestic sales volume of the manufacturers included in SIC 2311; 4.5-percent to 4.8-percent average before-tax profit on net sales, based on a sample of about 300 firms' corporation income tax returns filed with the Internal Revenue Service, as reported under SIC 2310 in the IRS *Corporation Source Book of Statistics of Income* for the fiscal period July 1967 through June 1968; and a 1967 median net before-tax income of 2.9 percent of net sales, drawn from an Ernst & Ernst survey of nine unidentified manufacturers of men's suits, coats, outerwear, jackets, and sweaters having sales of less than $6 million, prepared for the American Apparel Manufacturers Association.

Dr. Long also noted in his testimony, not mentioned by the trial judge, the earnings of four firms reporting their 1968 renegotiable receipts and profits, before taxes, to the board and classified under "Coats (SIC 2311)" by the board, apparently none of which manufactured the AG–44 under a rated order: Bonham Manufacturing, Inc., which realized a 4.5-percent return on $3.2 million sales; Rolane Sportswear, Inc., 6.5-percent return on $3.0 million sales; Marcie Dale, Inc., 3.2-percent profit on $3.7 million sales; and Rapid

[4] SIC 2311 is the United States Commerce Department's classification for makers of suits, formal wear, dress and sport coats, topcoats, vests, tailored coats, and uniforms for men and boys. SIC 2310, which closely tracks the above according to Dr. Long's testimony, is the Office of Management and Budget's standard enterprise classification, used by IRS.

American, 4.3-percent rate of earnings on $2.9 million sales (sales figures excluding GFP). He said he thought these firms useful for comparative purposes because their sales volumes more closely resembled plaintiff's than did those of other firms reporting 1968 earnings, and because volume is significant in that it "determines how much and how well you can spread fixed cost." Based on the foregoing, and particularly the IRS data, defendant's expert said that a return of $180,000 to plaintiff on its FY 1968 renegotiable business would be reasonable, in keeping with the compared profit figures, and giving due allowance for plaintiff's efficiency; no "favorable consideration" was thought due under any other statutory factor. He characterized this as leaving plaintiff with a 5.4-percent return on net renegotiable sales, excluding the value of GFP.

The trial judge accepted Dr. Long's analysis as basically correct, and applied the 5.4-percent profit rate to plaintiff's net renegotiable sales to reach a reasonable earnings figure. As noted before, he deviated from Dr. Long's approach by including part of the GFP value in the sales base; he also made several other adjustments, discussed hereafter. Plaintiff has objected that defendant's expert and the trial judge relied on irrelevant data in drawing their conclusions about profit excessiveness, pointing to the alleged remoteness of many of the firms in SIC Nos. 2310 and 2311 from plaintiff's sales volume, asset size, and type of product and manufacturing operation. Rather than focus on this data, plaintiff now insists, the inquiry into excessiveness should have looked, and looked only, to profit statistics drawn from firms more similar to plaintiff in all respects considered under the character-of-business factor, especially the product type. In other words, plaintiff would limit the comparison to the other AG–44 coat manufacturers. However, the groupings of firms singled out by defendant's expert are not irrelevant per se, but only would become so if adjustments were not or could not be made for the differences between them and plaintiff. In renegotiation, the comparability of firms and industries depends upon their similarity to the renegotiated contractor in such areas as the type and extent of risks undertaken and the entrepreneurial skills employed, and not solely

and dogmatically upon the likeness of the product type. Cross-elasticities of product demand do not assume the importance in renegotiation that they do in antitrust law; though the AG–44 coat was no doubt different from and more difficult to make than most other garments, it does not follow that the variant risks and skills involved cannot be taken into account in arriving at a reasonable profit figure. *Aero Spacelines, Inc.* v. *United States*, *supra*, 208 Ct. Cl. at 756–57, 530 F. 2d at 356. The finding of factual similarity of the compared groupings is not erroneous, as stated before, but comports with the basic similarity required by the data noted under the character-of-business factor for comparability, and so profit statistics drawn from the firms in these groupings may be used in this proceeding.

It is a different matter, however, to approve the reliance of defendant's expert and the trial judge on the statistics taken from the compared firms. Dr. Long focused, for the most part, on median and average profit figures. High and low quartiles, and top and bottom extremes of the industry profit ranges were not considered, nor apparently were the differences between the risks assumed by, and skills required of, plaintiff and the compared firms taken into account. All were lumped together in one great mass. But, as we said in *A. C. Ball Co.* v. *United States*, *supra*, 209 Ct. Cl. at 263, 531 F. 2d at 1015, "[n]o rule or principle says that the profit made on the highly efficient production for war of good quality materiel in volume is excessive when it exceeds the contemporaneous statistical average profit of comparable industry, composed of good, bad and indifferent producers."

Defendant cannot establish that excessive profits were realized simply by pointing to industry profit averages and medians and noting that the renegotiated contractor's profits came in above them. A reasonable profit rate will vary among contractors producing the same product, with the same risk and efficiency, depending upon the volume of sales, though no consideration was accorded this fact by defendant's expert save in the case of four compared firms, discussed below. *See Mason & Hanger-Silas Mason Co.* v. *United States*, *supra*, 207 Ct. Cl. at 142–43, 518 F. 2d at 1362–363. The reasonable profit will also differ from one firm to the next as

the risks assumed differ, and from one product to the next as the manufacturing complexities differ. It will not be the same for all producers because they vary in efficiency; the projection of the renegotiated contractor's reasonable profit must take his efficiency into account, and should not do so by guess or unarticulated opinion, one of which was the case with defendant's expert, but rather by reference to the profit of a similarly efficient compared manufacturer. This, of course, cannot be done when only average and median profit figures dominate the record. The careful comparisons called for by the statutory factors between the character, risks, and efficiencies of plaintiff's and other firms' businesses in order to ascertain a reasonable level of profit for plaintiff, have all been swept aside in defendant's expert's analysis. They are now precluded by a lack of data on industry profit ranges and by a lack of inquiry into the business character, risks, and efficiencies of the firms located on those industry ranges. In substitution for those careful comparisons, defendant has elevated a statistical profit norm to a place of primacy, adjusting it for efficiency in a manner that remains mysterious on the record and in the trial judge's opinion.

Obviously, the trial judge's conclusion on profit excessiveness, being so heavily reliant upon the expert's erroneous methodology, cannot stand. Neither excessiveness of profits, nor the extent of that excess, can be shown without resort to location of the renegotiated contractor on his industry's profit hierarchy. When only profit averages and medians appear in the evidence and expert analysis, the renegotiated contractor cannot be located on his industry's hierarchy and the reasonableness of his profits thereby measured, unless of course it is otherwise established that the contractor belonged at the average or median point on the scale. This has not been proved regarding plaintiff in the present case, and the court will not assume that the contractor before it is merely average. *A. C. Ball Co.* v. *United States*, *supra*, 209 Ct. Cl. at 264–66, 531 F. 2d at 1016–017.

There were other problems in the expert's and trial judge's reliance on the profit rates they chose. For example, defendant itself suggests in its brief that the profit percentages available in the Dun & Bradstreet and Ernet & Ernst surveys and

the IRS data excluded the value of customer-furnished materials from the sales base over which the percentages were calculated. While the absence of risks and responsibilities growing out of their possession of the materials would justify this accounting practice by industry firms that used such materials—and defendant further suggests that most firms included in the profit percentages did use customer-furnished materials—the inclusion of materials value by plaintiff and the exclusion of that value (at least in part) by firms plaintiff is sought to be compared with, would distort such a comparison. A different overall rate may well apply to firms that include the value of materials in their sales base.[5] It would not be appropriate to adjust for the profit rate difference growing out of the exclusion of materials value by simply removing the GFP value from plaintiff's sales figure, however, for this would still leave unaccounted for the difference in risks between plaintiff and the firms using customer-furnished materials. Another problem with the profit rates utilized by defendant's expert and the trial judge lies in the fact that the expert characterized his "reasonable" profit of $180,000 for plaintiff as a 5.4-percent return on sales. The trial judge proceeded to apply this percentage over the sales base he thought appropriate, yet this percentage was erroneously calculated by the expert on a sales base that included the alleged $900,000 excessive profits. The rate would have been 7.44 percent were the alleged excess removed (still excluding the GFP value, according to the expert's method).

In concluding this discussion, two other points are noted about the data brought in by defendant. First, the IRS-based profit percentages were, it is true, stated as a range, at first glance complying with the statutory factor's prescription of the kind of data needed and most useful. However, this range derives from different average figures calculated from two sets of tax return data, one that included only firms showing taxable income, and the other that covered firms

[5] That rate may be lower than for other firms because a lower profit percentage on the materials purchased and then resold in the manufactured product may be anticipated by the firm including the materials in its sales figure. This accords with the reasoning of the last sentence of 32 C.F.R. § 1460.14(b)(2) (1968), the board's regulation on profits of firms using customer-furnished materials.

with and without taxable income. Secondly, defendant's expert did cite the profits of four firms classified by the board as coat manufacturers within SIC 2311, and stated for each a volume of sales quite similar to plaintiff's. He was correct in thinking sales volume an important factor in his profit comparison—the absence of sales volume data is yet another defect in the average and median statistics that he used—for profit rates stated as percentages of sales will vary with the sales volume, as will the ability to spread fixed costs, a point mentioned by the expert. Though the sales volumes of firms need not be identical for comparison to be possible, the closer they are to one another, the more likely is the accuracy of the comparison. But if the likeness of the sales volumes, and the four firms' classification in SIC 2311 as military coat-makers, support the firms' profit comparability to plaintiff, there the data supporting comparability ends. It is not known what kind of coat, or what else besides coats, these firms produced for the Government, though they apparently did not make AG–44 coats. Little else is known about the character of the four firms' business operations, or their efficiencies and risks relative to plaintiff. The complexities of their manufacturing techniques cannot be weighed in these circumstances, to assess their degree of likeness to plaintiff. On balance, the earnings of this small sample do not appear particularly useful for comparative purposes, due to lack of information about the firms and products that produced them.

(4) *Efficiency.* The second sentence of the Act's section 103(e) reads in part: "In determining excessive profits favorable recognition must be given to the efficiency of the contractor or subcontractor, with particular regard to attainment of quantity and quality production, reduction of costs, and economy in the use of materials, facilities, and manpower * * *." The renegotiated contractor's ability to meet and even exceed production schedules, to produce a greater volume of goods or services without enlarging his asset base or expanding his work force, and to decrease his controllable expenses, as well as his success in minimizing defects in his products, are significant indices of his efficiency. *See* 32 C.F.R. § 1460.9(b) (1968). Of course, efficiency in some absolute sense does not exist in any business. Timeliness, height-

ened production, cost control, and maintenance of quality, all as aspects of efficiency, are to be noted for plaintiff and for each firm with which it is compared, in order to assess their efficiencies relative to one another. Determining the efficiency of one firm in relation to another, and not in a vacuum, is the objective of this statutory factor. The ascertainment of relative efficiencies is critical in renegotiation, for the renegotiation process, like the competitive market, seeks to reward the more efficient contractor with a higher profit than his less adept counterpart, *ceteris paribus*. Much is often made of the point that Congress has directed "favorable recognition must be given" the more efficient contractor to avoid any possibility of penalizing him in the course of controlling profits, yet the congressional direction does no more than recognize that firms vary in efficiency and that their profits should likewise vary. The information gathered under this factor should show where plaintiff stands among comparable firms as a matter of efficiency, thus helping to locate it on the industry profit range.

Unfortunately, the parties and the trial judge in this case have addressed the data under the efficiency factor as if some absolute determination, rather than a relative one, were the goal. Plaintiff was shown by the evidence to have produced high quality merchandise in very great quantity, completing some 3,000 AG–44 coats per week. Defendant has not complained about failure of plaintiff in meeting quality specifications or delivery schedules. There were but minor delays at the beginning of production. Plaintiff did increase its work force by about 50 percent over the previous year to perform its AG–44 contracts, and data relating to a decrease of the number of employees over the course of work in the review year, or relating to any decrease in costs, tending to show some degree of efficiency, was lacking in the trial judge's findings. Yet, the trial judge did expressly find that plaintiff performed its review year renegotiable work "capably, punctually * * *, and efficiently." Information on the reasonableness of plaintiff's costs would bear on its relative efficiency, for such information would show the competitiveness of plaintiff's production and overhead expenses with such expenses of comparable contractors and with the prices that the

market had to offer, as well as show plaintiff's attempts to lower its costs over those experienced in previous production of the same item. *See* 32 C.F.R. § 1460.10(b)(1) (1968). But the competitiveness of plaintiff's costs is not known, and since plaintiff produced on a first procurement of the AG–44 coat, prior cost experience with that item was not available. The trial judge made no findings regarding the efficiency of firms in plaintiff's industry other than plaintiff itself, and neither party has excepted to a lack of findings here.

Given the general lack of data on plaintiff's relative efficiency, there is little way of locating plaintiff on an industry profit spectrum, or even of concluding that plaintiff should be ranked above or below an isolated comparable firm, let alone how far above or below in terms of earnings. Merely average efficiency will not be assumed, and the absence of proof that plaintiff was merely average cannot be remedied by defendant's unsupported assertion to that effect. Plaintiff has brought forth enough information about its efficiency for it to be considered an efficient producer under the burden of proof rules in *Lykes Bros.*, *supra*. Since defendant has not established the contrary, plaintiff will be viewed as one of the most efficient producers in its industry for purposes of measuring profit reasonableness. "Not having shown that plaintiff should be compared with the manufacturer at the bottom, mid-point or any particular point on the [industry profit] scale * * * the Government has proven only comparability with the manufacturer who made profits * * * at the top of the scale * * *." *A. C. Ball Co.* v. *United States*, *supra*, 209 Ct. Cl. at 265, 531 F. 2d at 1016–017.

(5) *Extent of Risk Assumed.* Consideration must also be given to the "[e]xtent of risk assumed, including the risk incident to reasonable pricing policies" in determining excessiveness of profits. Section 103(e)(3). Congress, in requiring consideration of the risks borne by the renegotiated contractor and comparable firms, recognized that one purpose of competitive profit is to compensate the entrepreneur for the risks of financial loss and business failure he assumed in bringing his product or service to the marketplace. *See* P. SAMUELSON, ECONOMICS at 621–24 (10th ed. 1976). The statutory factor seeks to amass sufficient information to assure

that all risks assumed will be identified and adequately compensated, while being careful not to compensate one contractor at a higher rate than another for bearing the same risks. Thus, when the profits of comparable firms are matched with the renegotiated contractor's earnings to measure the reasonableness of the latter, the presence of risks common to all will not entitle the contractor to more or less profit than is merited by an otherwise comparable firm; compensation for those risks, to the extent the market will permit, is already internalized in the comparable firm's profit figure. On the other hand, the contractor's assumption of risks greater than any comparable firm will require a greater compensation, other things being equal.[6] Obviously, the assessment of risk under this factor is a comparative exercise, as was the case with efficiency. The ascertainment of relative risk-bearing is the goal, to aid in locating the renegotiated contractor on his industry's profit hierarchy.

Plaintiff ran a variety of risks in taking on the AG–44 work. It agreed to produce the coats under firm, fixed-price contracts, to guarantee the coats' delivery on dates and in numbers specified, and to warrant their conformity to the Government's demanding specifications, even though this was a first procurement of the AG–44. We said in *A. C. Ball Co.* v. *United States*, *supra*:

> An essential quality of the firm, fixed-price contract is that the contractor assumes responsibility for his costs, with the inevitable risk that greater costs will be incurred than were anticipated, and that the contract will result in loss rather than profit. * * *. The risk is intensified during the shortages which accompany war.
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> * * * * *

[6] This does not mean that because it is more risky for one firm, because of thin capitalization or inexperience to produce a product than it is for another, that the former is entitled to greater compensation. Within the same product type, where production and marketing problems are known not to vary from item to item, competing producers should generally receive the same risk compensation, which is internalized in the competitive price. Though one out of these producers takes greater risks in bringing his product to the market, competition levels the price for all, thereby excluding additional profit for extra risk-taking. However, when firms producing differing products are compared for renegotiation purposes, it becomes essential to read their profit figures in light of their varying production risks, to avoid holding the contractor who bears a higher risk due to greater product complexity to the lower earnings rate of his lower-risk counterpart.

> There is more flexibility in commercial work than in Government supply as to prices, delivery dates and other contract provisions; * * *. Substitutions or departures from specifications are not permitted under the Government contract, at least not without burdensome applications which must commend themselves to the approval of the officers of the Government's procurement system. * * *. A miscalculation in a bid, a botched job by an engineer, a misread specification—any of these all too possible events may mean no profit or worse. * * *.
>
> *Dangers are particularly present when bidding on a product for the first time.* Every item bid on with which the bidder has little or no familiarity, either as to manufacturing process or bid history, presents a threat of loss. * * *. [Emphasis supplied.]
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> * * * * *
>
> Among the more burdensome obligations in the Government contract is that of the contract delivery date, buttressed by threat of termination for default, liability for excess procurement costs and, often, liquidated damages. * * *. [209 Ct. Cl. at 248–51, 531 F. 2d at 1007–008.]

And see 32 C.F.R. § 1460.12(b)(1) (1968).

The risks assumed by plaintiff on contract pricing, production volume, and quality and timing warranties were substantial indeed, especially in light of the fact that neither plaintiff nor any other producer had ever before undertaken to make the complex and costly AG–44 coats.[7] Setting aside the use of GFP, plaintiff supplied all of its own capital and placed this at risk to carry production on the coats forward, securing a large line of credit with a local bank and tapping this to meet payroll requirements. Plaintiff further assumed the risk of manufacturing a garment far more complicated in design and construction than most commercial garments, including those that it had made in the past, and than most other clothing items procured by the military. Plaintiff's fellow AG–44 manufacturers assumed virtually these same risks, of course, save for their capital risks, which are not disclosed in the record. The extent to which other contractors classifiable under SIC 2310 or 2311 bore like risks is not dis-

[7] Though risks must be more than speculative to be considered here, they may be substantial even though they did not materialize. *A. C. Ball Co. v. United States*, 209 Ct. Cl. 223, 253–54, 531 F. 2d 993, 1009; 32 C.F.R. § 1460.12 (b)(1) (1968). Substantiality of risk, then, is to be measured at the time the risk was assumed, not retrospectively.

cernible from the evidence, though their manufacturing complexities and associated risks appear to have been less than was the case with the AG–44 producers. As was true under the efficiency factor, where the risks assumed by other firms are not known and therefore cannot be weighed relative to the risks undertaken by plaintiff, a barrier is raised to the use of those other firms' profit figures in determining a reasonable profit for plaintiff.

One last risk that plaintiff is known to have run, but that no other firm is known from the record to have run, is that of the temporary sacrifice of its commercial markets. Plaintiff's alienation of the McGregor and Londontown accounts in order to accept the OG–107 and AG–44 business damaged to an irreparable degree the steady and profitable supplier-customer relations that had been built up over the years. Bearing witness to this damage were the commercial losses that plaintiff incurred in the review year and the subsequent year, which the trial judge found to have stemmed directly from the pre-emptive termination of the two commercial accounts; the trial judge's findings on the existence of the alienation and the cause of the losses were supported by substantial evidence and are adopted as correct. A board regulation observes: "In some cases a substantial degree of risk will be found in the temporary sacrifice of civilian markets to competitors, in order to accept more defense orders * * *." 32 C.F.R. § 1460.12(b)(1) (1968).

Plaintiff clearly realized the risk of sacrificing its commercial accounts to other suppliers, and a competitively determined profit for plaintiff would certainly compensate for this long-term sacrifice.[8] Defendant suggests that plaintiff merits no "favorable consideration" for this sacrifice because at least some part of it was voluntary, in that plaintiff need not have taken as much rated order business as it did, but could instead have continued to devote a portion of its productive capacity to its regular customers' work. This argu-

[8] Compensating plaintiff for this risk does not run counter to the earlier observation, see note 6, *supra*, that added risks assumed by makers of the same product are not generally compensable. The fact is that a competitive price would indeed compensate for additional risks undertaken to *expand total* industry *capacity* in a product, where a high but still unsatisfied demand had kept the industry busy to existing capacity. This was the type of risk that plaintiff undertook here.

ment simply strays from the point, for it only matters that the risk existed. Where a risk is borne that is not compensated in any comparable firm's profit, it is nonetheless compensable by an upward adjustment of an otherwise reasonable profit figure for the risk-bearer, however judgmental in nature that adjustment must be. The trial judge's method of compensating plaintiff for the market sacrifice risks was to deduct from the portion of its profits determined to be excessive the amount of the FY 1968 and FY 1969 commercial losses. However, this approach should not be followed, and we decline to use it here, because it makes no effort to compensate the contractor for profits lost on the commercial work sacrificed, but only attempts to negate the deficits. *Cf. Butkin Precision Mfg. Co.* v. *United States*, *post* at 110.

(6) *Contribution to the Defense Effort.* The last statutory factor to be considered provides that there be taken into account in judging profit excessiveness the "[n]ature and extent of contribution to the defense effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance." Section 103(e)(4). We explained in *Mason & Hanger-Silas Mason Co.* v. *United States*, *supra*, 207 Ct. Cl. at 128–29, 518 F. 2d at 1354–355:

> * * * The contractor who performs a defense contract does not by that token make a contribution within the meaning of the Renegotiation Act. Favorable consideration is rather due a contractor for "superior performance" or "performance, assistance or service considered otherwise exceptional"; illustrations are "completion of urgent work ahead of schedule, or exceeding specifications" with benefit to the defense effort, "ingenuity in providing new uses" for products or equipment, "overcoming difficulties, which others have failed to overcome," or "experimental and developmental work of value to the defense effort," "new inventions, techniques, and processes of unusual merit," work under difficult or hazardous conditions, cooperation with the Government and with other contractors. Regulations, § 1460.13(b).

A footnote stated that the cited regulation, from which the opinion quoted, was adopted by the board in 1973, to replace a more tersely worded rule to the same effect framed in 1960.

As the quoted passage suggests, the factor focuses attention on extraordinary actions of the renegotiated contractor, not in keeping with his industry's normal commercial practices, but existing to the substantial benefit of the defense agencies' work. Where such actions aid that work by inventiveness or risk-taking or special accommodation, and are not compensated by consideration under the other statutory factors, Congress has provided under this factor that they be rewarded even though the market would not respond to them with a profit increase. This is done by raising the contractor's profit, as a matter of judgment, above an otherwise reasonable level.

Plaintiff did nothing in FY 1968 that entitles it to a defense contribution credit. It claims that some allowance is due it in recognition of the fact that it performed under rated order contracts, sacrificing commercial customers, and the fact that it recommended the elimination of an operation in the AG–44's manufacture that saved the Government $0.23 per coat on a price of about $60 per coat (before renegotiation). However, mere performance of a Government contract lays no foundation for credit here, and the commercial market sacrifice was taken into account under the risk factor and will be considered in the concluding analysis by virtue of that factor. The $0.23 saving was not so great in magnitude, nor shown to have been the product of so much inventive or risk-taking effort, as to qualify plaintiff for a reward of exceptional performance, experimental work, or development of techniques of unusual merit. No adjustment will be made to plaintiff's otherwise reasonable profit on account of this factor. It is not known whether the board, in arriving at reasonable profit figures for any of the other AG–44 coat manufacturers with which plaintiff seeks to be compared, gave credit to any firm under this factor.

Summary

The only profit figures in evidence that have any utility in the final determination of a reasonable profit for plaintiff are plaintiff's after-renegotiation profit rates for several of its fellow AG–44 coat manufacturers, and defendant's earnings figures on four other coat manufacturers whose work

was subject to the Act and whose returns were cleared by the board. As we said earlier, the profit rates of the latter four coatmakers are accompanied by such a paucity of information about the firms that they are but marginally useful in constructing a comparison to measure the reasonableness of plaintiff's profit. Taken alone, they could not make out a case that plaintiff's profits were excessive. The 3.2-percent to 6.5-percent rates of return are calculated over a sales volume similar to plaintiff's, but they may well be significantly lower than a reasonable return for plaintiff, because, for all that appears in the record, the four underlying firms may have been less efficient than plaintiff, may have been producing items less complex in construction than plaintiff, and may not meanwhile have run the commercial market sacrifice risk that plaintiff did. We will not assume that plaintiff's efficiency, manufacturing complications, and market loss risks were at or below the level of the four firms defendant presented without much explanation, and indeed, we will not assume these to be less than those experienced by the highest-compensated firm in plaintiff's industry—these firms clearly were not at the top of the renegotiable SIC 2311 manufacturers in earning capacity—absent contrary proof. The 3.2-percent to 6.5-percent rates can serve to establish the lower part of the reasonable profit spectrum in plaintiff's industry.

Far more important to drawing a conclusion about profit reasonableness here are the after-renegotiation profit statistics that plaintiff placed on the record, the ones representing the board's reworking of several other AG–44 manufacturers' earnings. These are more important precisely because the demonstrated closeness of the underlying firms' operations and risks to plaintiff make the figures more probative of what a comparable competitive profit would be for plaintiff. *Aero Spacelines, Inc.* v. *United States*, *supra*, 208 Ct. Cl. at 753, 530 F. 2d at 354. We previously noted that the AG–44 makers' risks were virtually the same as plaintiff's, save for their commercial market loss risks, about which there is no information. There is similarly no mention in the evidence of their efficiencies relative to plaintiff, though an exhibit in evidence shows that three of the firms had sales volumes similar to

plaintiff's. The other AG–44 manufacturers obviously were faced with the same construction complexities, stemming from the coat's design, as was plaintiff; if their production in the review year included items besides the AG–44, this does not appear from the record. Overall, if we are willing to make judgmental adjustments, absent a more comprehensive hierarchy of industry earnings, to allow for differences in efficiency and market sacrifice risk between plaintiff and these firms, their profit rates can be used to settle upon a reasonable rate of return for plaintiff on its AG–44 work.

Two objections were voiced by defendant to the use of the AG–44 firms' profits here. The first objection is specifically directed against one of the profit figures, that of Leon Manufacturing Co., which the board left with a 25.1-percent profit on sales of $1.0 million. Defendant is correct that the board's figure lacks comparability in this instance. It is not clearly indicative of the full intention of the board because a statutory floor forbade lowering Leon's renegotiable sales receipts below $1 million. *See* section 105(f)(1), *supra*. This may well have left the profit rate above a level entirely satisfactory to the board, for the board's revision did indeed take the sales figure (in the course of elimination of part of the profits) down to the statutory floor. Thus, the figure which is suspected of including excessive profits, because determined in a marketplace of inadequate price competition, remains suspect because of the frustration of the board action attempting to purge the figure of such excessiveness, assuming the board action can remove such suspicion (see the discussion immediately below). So lacking the necessary indices of competitiveness, Leon's profit rate has little place in an inquiry into profit reasonableness.

The second objection relates to the validity of using the remaining AG–44 firms' profit percentages, as well as the earnings rates of the four firms singled out by defendant's expert. The after-renegotiation profit figures supposedly eliminate any excessive profits realized in the firms' review year earnings, and so theoretically provide reasonable profits against which plaintiff's review year performance might be measured. The point that defendant presses is that the use of profit figures revised by the board, sometimes pursuant to

unilateral order and sometimes to effect a compromise settlement, is of questionable propriety in a de novo redetermination proceeding. *See* section 108 of the Act, 50 U.S.C. APP. § 1218 (Supp. V, 1975). Certainly, one difficulty in making use of these figures is our lack of full knowledge on the information the board had before it and the judgments and adjustments it made in the course of issuing orders and accepting settlements. But all the after-renegotiation figures, even those arising from settlements, make at least some attempt to reconstruct what the renegotiated contractors' profits would have been in a competitive market, and so are not totally lacking in probative value. The data available for comparisons in redetermination proceedings is frequently sparse and plagued with ambiguities and unknowns, yet the vital need for comparative data means that it is not to be disregarded completely without strong reason. *Mason & Hanger-Silas Mason Co.* v. *United States*, *supra*, 207 Ct. Cl. at 143–44, 518 F. 2d at 1363; *Aero Spacelines, Inc.* v. *United States*, *supra*, 208 Ct. Cl. at 729–30, 530 F. 2d at 340.

In that plaintiff is the one that has brought the several AG–44 manufacturers' after-renegotiation profits before the court, thus acceding to their probativeness in determining a reasonable profit for itself, we think we may safely use these figures. It was up to defendant to produce evidence of their lack of comparability, if it so desired. Defendant, of course, does not as freely enjoy the privilege of importing board-created profit figures into the record, for this would likely result in a boot-strapping operation, proving the propriety of board determinations on the basis of other board determinations. Such a practice would virtually obliterate plaintiff's right to de novo proof by defendant that plaintiff earned excessive profits. We do take cognizance of the after-renegotiation profit figures of the four renegotiable SIC 2311 firms placed on the record by defendant, but only in restricted circumstances here. The figures compose the lower end of the industry profit spectrum, and not the higher segment with all the significance that attaches to it in the event of a failure of proof on the renegotiated contractor's efficiency and risk, and the figures were not board-determined except insofar as the firms were issued clearances.

The other AG–44 manufacturers whose after-renegotiation profits were placed in evidence by plaintiff showed earnings, excluding GFP, of 12.8 percent on $4.226 million in sales (Wales Mfg. Co.), 13.2 percent on $3.943 million in sales (Pembroke, Inc.), and 9.5 percent (a clearance figure) on $1.642 million in sales (Gentry, Inc.). Plaintiff did not single out this last figure in its survey of after-renegotiation profits, but since it said it included the underlying firm in the before-renegotiation average profit rate that it also offered to the court, we take it that plaintiff viewed the firm as comparable and we include the firm's profit in this discussion. The same figures, including the value of GFP, are (in the same order) 9.1 percent on $5.914 million in sales, 8.0 percent on $6.509 million in sales, and 7.7 percent on $2.016 million in sales. By comparison, plaintiff's net renegotiable profit of $1,001,-462 [9] amounted to 30.2 percent of $3,318,050 in sales exclusive of GFP, and 21.9 percent of $4,564,248 in sales including the GFP value.

Plaintiff's renegotiable profit figure derives from net earnings on review year Government work of $1,079,962, less $78,500 in special deductions allowed by the trial judge. Defendant and plaintiff alike dispute allowance of these deductions, defendant because it believes them improper as a matter of law, plaintiff because it thinks them insufficient in amount. The allowances concern $28,000 in special tools that plaintiff had to purchase to be able to perform the AG–44 work, which the trial judge found useless to plaintiff upon cessation of that work at the close of the review year, and $107,000 in construction costs for a building that state authorities insisted that plaintiff build to provide sanitary facilities sufficient to accommodate its work force then recently increased to enable production of the AG–44 coats, which the trial judge found plaintiff largely unable to utilize in subsequent years. The trial judge's findings are supported by substantial evidence, and modification of plaintiff's accounting to bring about a clearer reflection of renegotiable

[9] Defendant has contended that this figure understates plaintiff's profits because the compensation paid by plaintiff to its three manager-owners was excessive in FY 1967 and FY 1968. The trial judge found the compensation figures to be reasonable, if not low, and as his findings are supported by substantial evidence, we have no occasion to overturn them.

costs is within the court's authority. Section 103(f) of the Act, 50 U.S.C. APP. § 1213(f) (1970).

Items of cost are allowable in renegotiation which may be estimated as deductions under Chapter I of the Internal Revenue Code of 1954, as amended, and regulations thereunder. *Id.* The trial judge relied on section 167 of the Code and section 1.167(a)–9 of the regulations as authority for the equipment and building obsolescence deductions he allowed. While we question the use of the obsolescence provisions to deduct the value of plaintiff's equipment and building on the findings made, we are content to let those provisions stand as authority for the deductions since defendant has made no argument that the trial judge erred on the law.[10] Normally, a prospective estimate about the useful life of depreciable assets is the means by which an abnormally fast obsolescence is accounted for, as in plaintiff's situation. However, for purposes of renegotiation, we think it correct for the trial judge, on the facts of this case, to have adjusted plaintiff's accounts in retrospect, to match the true costs of performing the renegotiable work against the receipts derived from it. Though plaintiff may originally have estimated the useful lives of its special tools and building incorrectly, a refusal to adjust its accounts now would forever bar the proper matching of its renegotiable costs and receipts for FY 1968.

Though the deduction of the special tools' and the building's costs against renegotiable receipts in determining profit will thus be allowed, the trial judge permitted deduction of only $25,000 out of the $28,000 in tooling expenses, and of only one-half of the building construction costs, totaling $78,500. His actions, based on findings of actual costs to plaintiff not shown to be erroneous, must stand. The $3,000 spread between the cost and the allowed deduction for the tools is understandable as an adjustment to account for depreciation already allowed against renegotiable receipts and for salvage value. The 50-percent disallowance as to the building is likewise appropriate in that it appears to with-

[10] Defendant has contended only that the record does not support the trial judge's findings that the equipment and building became useless to plaintiff, and not that this is insufficient to justify a deduction.

hold credit from plaintiff to the extent that the building did have some residual value to plaintiff and that it was more capacious than required by the state authorities (the employees' washroom occupied less than 10 percent of its floor space, the remainder being devoted to offices and production area), indicating that plaintiff contemplated some other future use for it when it was constructed.

Plaintiff apparently brought in the after-renegotiation profit data on the (now three) AG–44 producers because it thought their operations and risks, and therefore their earnings, fairly comparable to what plaintiff itself would have made in a competitive market. It is true that plaintiff thought, as remarked in its brief, that some further upward adjustment of profit would be allowed it upon a finding that "favorable consideration" was in order on account of its efficiency. This of course misperceives the role of the efficiency factor in renegotiation, the proof under which may show one contractor to be relatively less efficient than an otherwise comparable contractor and so entitled to less in profit on the same volume of sales. Plaintiff is nonetheless in line to receive the highest credit for its efficiency, as noted before, because it has introduced evidence tending to show its efficiency sufficient to carry its minimal burden under *Lykes Bros.*, *supra*, while defendant has failed to carry its heavier burden of establishing that something less than the highest credit is due. The greatest problem for the court, at this point, is that a comprehensive industry profit range is nowhere in the proof, meaning that the top industry reasonable earnings level is unknown, and meaning in turn that there is no way to locate plaintiff at a top earnings figure to compensate it for its efficiency (and various risks assumed not inherently compensated in the AG–44 manufacturers' rates of return), save by engaging in a purely judgmental exercise.

Renegotiation is not a rate-making proceeding, conducted before an administrative body vested with considerable discretion. The court seeks to base its redeterminations of profit excessiveness upon hard evidence to preclude a foray into the realm of arbitrariness. *Aero Spacelines, Inc.* v. *United States*, 208 Ct. Cl. at 728–29, 530 F. 2d at 339–40. Yet, the court is

also bound to interpret and apply the Act in a manner consistent with the congressional purpose of remitting excessive profits to the public treasury. The facts in this case show both a market in AG–44 coats in which price competition was minimal at best, and a striking disparity between the profit figures that plaintiff itself introduced as reasonable and comparable to plaintiff's competitive earning power, and plaintiff's actual earnings in the review year. Differences between plaintiff and the comparable firms in efficiency and risks doubtfully justify the size of the profit gap in plaintiff's favor.

Renegotiation law is at an early stage in its development in this court. Parties to these factually and conceptually complex cases are not yet well informed as to the kind of proof required to make a convincing case one way or the other, for the court itself is still busied enunciating standards to guide the location and the weighing of that proof. In these circumstances, the court will undertake, however reluctantly, and for only a limited span of time, to engage in judgmental adjustments and reworkings of the data placed in the record in order to arrive at a finding of a reasonable profit for the renegotiated contractor—where the state of the evidence permits this to be done in a responsible manner, consistent with the purposes of the Act, as we think is the situation here, but compare *Aero Spacelines, Inc.* v. *United States*, *supra*. Here, according plaintiff due credit for its demonstrated (and not rebutted) efficiency and for the risks it bore beyond those that its fellow AG–44 manufacturers carried, and considering the profit figures that plaintiff itself brought into the case as evidence of comparable competitive earnings, we think that leaving plaintiff with fully one-half of the rate of earnings it actually realized will place its FY 1968 earning capacity at that point on the relevant industry hierarchy where it would have been located in a competitive market situation. With the burden of proof resting on defendant, the evidence assuredly warrants no more stringent treatment of plaintiff than the above will provide.

Accordingly, plaintiff is found to have realized excessive profits of $560,000, after elimination of which plaintiff will retain a return on its renegotiable work of 16 percent of

$2,758,050 in sales excluding GFP, and 11 percent of $4,004,-248 in sales including GFP.

CONCLUSION OF LAW

Upon the findings of fact which are made a part of the judgment herein, and for the reasons given in the opinion, the court concludes as a matter of law that for the fiscal year ended January 31, 1968, plaintiff and Major Clothing Co., as a consolidated group, realized excessive profits in the gross amount of $560,000 from contracts and subcontracts subject to renegotiation under the Renegotiation Act of 1951, as amended. Judgment is hereby entered on defendant's counterclaim in the sum of five hundred sixty thousand dollars ($560,000) less appropriate state and federal tax credits, plus interest thereon as provided by law, and it is ordered that plaintiff is entitled to a refund of the amount paid to defendant in excess of the judgment entered on the counterclaim, together with interest as provided by law.

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549 F.2d 196

ON DEFENDANT'S MOTION FOR REHEARING EN BANC PURSUANT TO RULES 7(D) AND 151

February 4, 1977

ORDER

Theodore M. Kostos, attorney of record, for plaintiff. *Stassen Kostos and Mason*, of counsel.

Raymond B. Benzinger, with whom was *Assistant Attorney General Rex E. Lee*, for defendant. *Donald W. Crockett*, of counsel.

Before DAVIS, *Judge*, Presiding, LARAMORE, *Senior Judge*, and BENNETT, *Judge*.

This case comes before the court on defendant's motion, filed December 3, 1976, for rehearing *en banc* pursuant to Rules 7(d) and 151 [*see ante* at 1, 543 F. 2d 97.] Upon consideration thereof, together with the response in opposi-

tion thereto, without oral argument, by the seven active judges of the court as to the suggestion for rehearing *en banc* under Rule 7(d), the suggestion is denied. The case has further been so considered by the panel listed above as to the motion for rehearing under Rule 151.

Plaintiff, in its response opposing defendant's suggestion, has requested a clarification "as to whether [the court] deducted the added costs for tooling expenses and building construction * * * before it made its assessment of one-half of the earnings actually realized." The court affirms that it did allow as a renegotiable expense and did deduct the $78,500 amount, relating to plaintiff's special tools and new building. What is apparently confusing plaintiff is its perception that the court intended to let it retain about 50 percent of its renegotiable profits (a figure calculated, of course, by first subtracting all renegotiable expenses, including the $78,500 sum). The court, however, did not allow plaintiff to keep one-half of its *earnings*, but rather concluded to leave it "with fully one-half of the *rate* of earnings it actually realized * * *", *ante* at 48, 543 F. 2d at 124. (Emphasis added.) Plaintiff, then should have been, and was, allowed to retain slightly more than one-half of its renegotiable profit rate, 16 percent out of 30.2 percent excluding GFP, and 11 percent out of 21.9 percent including GFP.

IT IS THEREFORE ORDERED that defendant's said motion for rehearing be and the same is denied.

DAVIS, *Judge*, concurring:

I have voted against rehearing *en banc* and, as a member of the panel I also reject the defendant's motion for rehearing addressed to the three judges. Accordingly, I accept and concur in the court's order but I wish to make it explicit that I agree with Judge Nichols that (a) the opinion in the present case does not prescribe any fixed or "correct" formula for renegotiation in this court, to the exclusion of other appropriate methods of reaching a just result, such as that used in *Butkin Precision Mfg. Corp.* v. *United States*, *post* at 110, 544 F 2d 499; (b) however, in many cases, if not most, the histories of comparable companies (particularly

the profit histories) furnish relevant and significant information helpful in the renegotiation of a plaintiff company; and (c) the defendant has not made, but should make, a solid effort to put before the court, as part of the Government's case, at least as much of the comparative data which was before and used by the Renegotiation Board, in determining the excessive profits of the particular plaintiff, as can be presented without unduly impinging on the rights of third parties.[1]

I add that I am not yet convinced that it will be too burdensome for the Government (i) to bring forward the relevant information which it can properly obtain from the Board for use in this court, and if necessary (ii) to put in as part of its case, either through expert testimony or documentary materials, other pertinent information bearing on comparative profits which will tend to support defendant's position in the specific litigation. But if it should turn out, after a fair trial-period, that defendant cannot reasonably be expected to produce either of these types of evidence, then the court will face, as I forecast it, the problem of whether to loosen the requirements on the defendant or to decide that under the Renegotiation Act as it now exists[2] a fair determination of excessive profits simply cannot be made by this Article III court in the absence of those categories of information.

NICHOLS, *Judge*, concurring:

I voted to deny the defendant's motion for rehearing en banc and wish to indulge in the infrequently exercised privilege of stating why:

I was, of course, particularly concerned about the inconsistency alleged by defendant to exist between the instant decision and the one in *Butkin Precision Mfg. Corp.* v. *United States*, *post* at 110, 544 F. 2d 499 (1976). It might be supposed that judges would have sufficient common sense, that the writer of each opinion would read the other before

[1] The contours and limits are sketched in the opinions in *Instrument Systems Corp.* v. *United States*, 212 Ct. Cl. 99, 546 F. 2d 357, and *Marinette Marine Corp.* v. *United States*, 212 Ct. Cl. 114, 546 F. 2d 365, decided Dec. 15, 1976.

[2] I refer especially to the requirement of a *de novo* court trial and to the statutory permission to the Government to seek a higher determination of excessive profits than that made by the Board.

the respective panels voted. This in fact occurred, and neither judge suggested any change in the opinion of the other. It is possible that each decision would be different in technique and approach if written by the other judge, though the one in *Butkin*, at least, owed its structure largely to the choices of the parties, in presenting their evidence and contentions. Defendant's able expert presented us with a technique, if you like, which we employed, only taking into account and fitting into place certain considerations we did not think he gave enough weight to. The evidence in *Major Coat* was, of course, different. Defendant seems to believe the opinion in that case prescribes a fixed formula, one it says is impractical to follow. There is no fixed formula in renegotiation. A fact finder who decently respects the evidence, the statutory factors, and the Board regulations construing them (so far as reasonable or enjoying a presumption of Congressional ratification) is free to approach his conclusion in a variety of different ways. Congress did not tie our hands in prescribing the factors. The Renegotiation Board, despite much interpretative publication, may have leaned over backwards to avoid binding its exercise of discretion in advance; at least, at one time I thought it should have published more than it had. Just as in *Butkin*, we reached the same result as the trial judge, by a different route, I would presume we might have reached the *Major Coat* result by the *Butkin* route. In my view, neither decision was intended or could properly have undertaken to prescribe a formula to the exclusion of others, or make its own technique of adjudication the exclusive one to be employed thereafter. As Mahomet wisely remarked, there are many ways of getting to paradise. It follows that defendant is not hampered in sustaining its burden of proof according to whatever theory it can persuasively advance.

The court did intend, in *Major Coat* as in almost all our reported cases to date, to sound a note of dissatisfaction with the evidence defendant has in fact used to prove its cases. We presume in favor of the Renegotiation Board, as we would in favor of any official body, that it acts in good faith on the basis of information it deems adequate, and that it follows its own regulations. Therefore it really must, we believe, exactly

as its regulations say, consider comparative companies when it applies the factors, for several purposes. Yet defendant comes into this court saying it does not have comparison information and it is up to the plaintiff to supply it. In *Major Coat* defendant attached to its motion for rehearing tabulations showing the profit history of comparable companies. The plaintiff responded that it had obtained these tabulations for the record by discovery, over defendant's vigorous objection. And so it goes. As noted in *Instrument Systems Corp.* v. *United States*, 212 Ct. Cl. 99, 546 F. 2d 357 (1976), defendant there frankly acknowledged that its policy was to keep out of our cases entirely all use of specific third-party company data for comparison purposes. A few freak cases aside, defendant cannot persuade this court that the evidence does not exist, that the administrative body whose decision occasioned the appeal here did not have it and use it, or that it is plaintiff who has elected not to supply it here. As a broad general proposition, with perhaps exceptions of significance, if the court feels that evidence of this kind is needed for an informed and reasoned adjudication, and that it exists and was used by the tribunal below, it is defendant who must lose, under our burden of proof pronouncements, if it is not in the record.

Another factor is relative resources. Butkin was a small company, badly crippled by its loss of war business and unable to furnish a bond to stay collection of the refunds the Board proposed. Defendant employed in preparation against it, according to the record, 206 days of FBI agent time, not counting the overtime FBI agents always put in. Yet those agents could not, ostensibly, spare the hour or two that would have been required to obtain from Avco, Butkin's prime contractor, data as to the performance of other subcontractors to Avco who furnished the same components Butkin furnished, including the extent to which they were aided in so doing by Butkin's technical assistance. From the cases that have come before us to date, I deduce that it will not be the giants of defense industry, but the little and often impoverished Butkins, who will furnish the bulk in number of our renegotiation appeals. Defendant will employ resources to defeat them that they cannot match. This, too, sustains the

reasonableness of our burden of proof allocation. Defendant should have the burden of supplying comparative data available not only from its own files, but from other sources equally accessible to it and to the plaintiff.

The Tax Court assigned to the contractor the burden of proving the Board wrong. The Board's decision, and its statement of reasons, had to be attached to the petition. In reassigning the burden as we did, we were quite frankly seeking to make ground rules for a fairer contest. However, the Tax Court procedure had certain advantages for the contractor too. He could rely on parts of the Board decision that were favorable to him, and its fact findings might inure to his benefit, without cost or effort by him. Defendant here would take that advantage away and thus, under our procedure make the sustaining of an appeal harder and more costly instead of easier and cheaper. I do not think this consequence need follow: even if the Board's decision enjoys no presumption of correctness, it does not follow that the contractor is not entitled to benefit from the Board's data gathering and factual conclusions. I wish it had been routine in every case here to put in the record the Board's decision and statement of reasons, for whatever value it might have.

Defendant in its instant motion says the Tax Court presumed that the Renegotiation Board had expertise. This is something defendant is not now guilty of. By seeking, in so many cases, if not in all, to show that the Board decision is grossly insufficient, it displays a belief that the Board lacks expertise. A consequence of course is that it cannot use Board members or staff as expert witnesses. Such a person would stultify himself if he testified in support of a refund 50 percent more than his agency had proposed. Where defendant so glaringly lacks confidence in the Board's expertise, it cannot expect the court to supply it. Plaintiffs usually cannot afford experts. Their counsel in some instances may believe they themselves can double as experts, though this runs up against the rule that counsel does not testify. Defendant, having cut itself off from the most natural and obvious source of testimonial support, has had difficulty convincing us with the experts it has substituted. Renegotiation, like other human activities of long duration, has its wearers of the old

school tie. Defendant's experts, as a rule, are manifestly not of that caste. They lack the experience so many people have shared since 1942, of actually renegotiating defense contracts and subcontracts. I do not think the statutory *de novo* character of our proceeding, with our shift in the burden of proof, together or separately mandate the complete eclipse of the Board and its personnel that has occurred.

Defendant in the rehearing motion before us has been blunt, far beyond the criticisms usual in rehearing motions. It says we have denied it the possibility of success in future renegotiation trials here, and fouled up the future operations of the administrative board. I respect bluntness in advocacy, and wish we had more of it. But it invites bluntness in return. I have been blunt and I will further bluntly say the prospects of success of defendant in future renegotiation cases here are less than rosy, unless it can persuade itself to adapt to our decisions.

This is not, however, to say I think defendant should have been done markedly better than it did, in our reported decisions to date, with a different style of advocacy, or other testimony. In most of them, plaintiffs had things going for them that no procedure or allocation of burden of proof could have leached away. This is markedly true of the case immediately before us. *Major Coat Co.* had government business forced on it against its will, and had to drop its major civilian customers, as a result, to its great and apparently lasting detriment. At least, in our other reported cases, the contractors were in defense business voluntarily. *Cf.* observations of Cowen, *Chief Judge*, in *Sandnes' Sons, Inc.* v. *United States*, 199 Ct. Cl. 107, 120, 462 F.2d 1388, 1395 (1972):

> * * * The most important consideration, and one which the plaintiff has failed to meet, is that it became subject to renegotiation only because it voluntarily entered into contractual relationships with the United States. That its contracts would be subject to renegotiation was expressly stated in the contracts; it is inarguable that the plaintiff is chargeable with knowledge of the terms of its contracts and the statutes and regulations governing Federal procurement. * * *

While the court's fact recitals show that Major Coat did sign the contracts awarded to it, they also strongly suggest duress

or at least compulsion, which in law may not be the same thing exactly. I would not automatically exempt from renegotiation a contract awarded under such circumstances since I do not think the law does so, but I would determine excessive profits and assess a refund only with the greatest hesitation, on clear and convincing evidence that the profits were, under all the statutory factors, excessive. In World War II, when renegotiation started, all defense contracting, practically, was subject to "rated orders." In the Vietnam war situation, the burden on Major Coat was special and peculiar. The Army seems to have also used rated orders in *Blue Bell, Inc.* v. *United States*, No. 603–71 (slip op. filed April 8, 1977) but without the degree either of coercion or of detriment to the contractor, shown in *Major Coat*. In World War II a manufacturer practically had to have rated orders so he could stay in business. He needed the ratings to pass on to his suppliers. Thus, a "rated order" was then a benefit, even a necessity, not a detriment.

I am unable to say the panel's treatment of the *Major Coat* circumstances is unwarranted, but I will say that on a first superficial reading of the opinion, I felt surprise that the panel should adjudicate as large a refund as it did. We have no motion for rehearing by plaintiff before us, so I have not considered how I would have voted had there been one. Defendant is fortunate that, in gaining experience as to what to avoid, it has not lost the taxpayers any substantial amount that they should have saved.

Defendant in its motion referred to various decisions by our trial judges that have not come before us for final adjudication. I have taken defendant's word, more or less, for what these decisions hold, but I have not obtained and read them. I think the parties are entitled to have those cases reviewed by us at the appropriate time in accordance with our rules, and not by anticipation. *Instrument Systems Corp., supra*, was different in that in a matter of trial procedure, the inconsistency of several trial division orders was expressly made the basis of a request for review. The orders in question might have been subsumed in the final disposition of the cases (as one was) and the evil defendant complained of might

Syllabus

have continued indefinitely without ever being corrected if we had not initiated a review and considered the inconsistency. That is not the situation here.

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543 F.2d 1290

MARGARET BOYCE AND MINNIE DIXON v. THE UNITED STATES

[No. 384–74. Decided October 20, 1976]

ON PLAINTIFFS' AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Civilian pay; dismissal; administrative discretion; penalty; reopening of decision of Board of Appeals and Review.—Plaintiffs, former longtime employees of the Internal Revenue Service (Mrs. Boyce a GS–2 data transcriber and Mrs. Dixon a GS–3 file clerk) were dismissed on December 1, 1972 and February 20, 1973, respectively, for failure to file certain tax returns in a timely manner. Plaintiffs appealed their dismissals; the Civil Service Commission Regional Office reversed the removals; the IRS appealed; the CSC Board of Appeals and Review, while sustaining the charges, held that plaintiffs should be reinstated after specified suspension periods, and that the penalties of removal were unwarranted as unduly harsh; the IRS appealed to the CSC Commissioners requesting them to reopen the Board's decision; the Commissioners overruled the Board's decision and upheld the dismissals. Plaintiffs then filed the present action seeking reinstatement and back pay. It is *held* (1) that there is adequate evidence to show that plaintiffs were guilty of failure to file tax returns in a timely manner, thus warranting some punishment; and (2) that the penalty of dismissal was unconscionably disproportionate and the determination of the Commissioners cannot be accorded its usual deference under the facts of this case where plaintiffs were low-level employees who relied upon their husbands to file the returns, there is no evidence that the failure was willful or intentional, defendant has not shown that plaintiffs benefited from their actions, but on the contrary were denied timely tax refunds, two reviews of the decisions to dismiss concluded that the penalty of dismissal was too harsh, and the Commissioners, without giving reasons, reopened the case and reinstituted the penalty. Plaintiffs are entitled to recover. Plaintiffs' motion for summary judgment is granted, defendant's cross-motion is denied, judgment is entered for plaintiffs, they are ordered to be reinstated, and the case is remanded to the Trial Division to determine the amount of recovery.

Syllabus

Civilian pay; Court of Claims jurisdiction; administrative or executive decisions; review of by court.

[1] This court's review of administrative determinations is limited to a finding of substantial evidence supporting the decision.

Administrative Law and Procedure ⟸ 791

Civilian pay; administrative discretion; penalty.

[2] In an overall sense, the penalty for a federal employee's misconduct is a matter usually left to the sound discretion of the executive agency. However, if the punishment exceeds the range of sanctions permitted by statute or regulations, or if the penalty is so harsh that it amounts to an abuse of discretion, it cannot be permitted to stand.

United States ⟸ 36

Civilian pay; administrative discretion; abuse of discretion; penalty.

[3] While plaintiffs are guilty of failure to file tax returns in a timely manner and cannot escape responsibility for such failure by relying on their spouses, such inadvertent conduct should be reflected in the penalty imposed. In evaluating the propriety of the imposition of the penalty of dismissal on the subject low-level Internal Revenue Service employees, consideration must be given to the fact that their failure was not knowing, wilful or intentional.

United States ⟸ 36

Civilian pay; dismissal; appeal to Civil Service Commission; reopening of decision of Board of Appeals and Review.

[4] Given the unusual action of the Civil Service Commission in reopening the decision of the Board of Appeals and Review primarily for the precedential value which would attach to dismissal of the subject employees, the CSC must be careful to observe the basic dictates of fairness in such instances, particularly where an extremely harsh penalty is sought by the agency.

Officers ⟸ 72(2)

Civilian pay; dismissal; appeal to Civil Service Commission; reopening of decision of Board of Appeals and Review.

[5] While not a basis for reversal of the Civil Service Commission because of its failure to give reasons for overturning a decision of the Board of Appeals and Review which determined that penalties of removal of plaintiffs were unwarranted as unduly harsh, in order for this court to accord the usual degree of finality to the CSC decision, reasons for the reversal should be enunciated.

Officers ⟸ 72(2)

Civilian pay; administrative discretion; abuse of discretion; penalty.

[6] An unconscionably disproportionate penalty aids neither the goal of deterrence nor the image of the Civil Service Commission. If a penalty is so harsh as to constitute an abuse, rather than an exercise, of discretion, it cannot be allowed to stand.

Officers ⟸ 72(2)

Robert M. Tobias, attorney of record, for plaintiff.

Julie P. Dubick, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before NICHOLS, KASHIWA, and KUNZIG, *Judges*.

KUNZIG, *Judge*, delivered the opinion of the court.

In this civilian pay case plaintiffs Margaret Boyce, formerly employed as a career seasonal GS–2 data transcriber, and Minnie Dixon, formerly a GS–3 file clerk, contest their dismissals from employment with the Internal Revenue Service (IRS). Plaintiffs seek both reinstatement and back pay. The IRS removed them from their positions because they had failed to file certain tax returns in a timely manner. We find the penalty of dismissal so disproportionate to plaintiffs' offenses that defendant's conduct can only be described as an abuse of discretion. Accordingly, we hold for plaintiffs.

Both Mrs. Boyce and Mrs. Dixon were employed, before their separations, at the IRS Kansas City Service Center. Until their removal, both had performed their duties satisfactorily throughout their careers, Mrs. Dixon for some 13 years and Mrs. Boyce for 12. In the fall of 1972, Mrs. Boyce received notice of a proposed adverse action. After her personal reply, she was removed on December 1, 1972. In November 1972, Mrs. Dixon received notice of a proposed adverse action and on February 20, 1973, she was removed.

Both plaintiffs appealed their removals to the Civil Service Commission (CSC) Regional Office. *In each case, the CSC Regional Office reversed the removal* and the IRS appealed. The CSC Board of Appeals and Review (BAR) held that Mrs. Dixon should be reinstated after a 60-day suspension. Mrs. Boyce was ordered reinstated after a 90-day suspension. While the charges were sustained, the BAR, like the CSC Regional Office, concluded that under the circumstances the penalties of removal were unwarranted as unduly harsh.

The IRS again appealed, requesting that the CSC Commissioners reopen the BAR decisions. Because the cases were similar, the IRS asked the Commissioners to consider them

jointly. Accordingly, the cases were reopened and in a single decision, the CSC overruled the BAR and upheld the dismissals.

Plaintiffs then timely brought the present action attacking the CSC decision. Plaintiffs' assault takes three forms: First, they argue that the IRS did not establish a rational nexus between the conduct complained of and the efficiency of the service. Second, they contend that the penalty of dismissal was so harsh as to be arbitrary and capricious. Third, they charge that the CSC decision embodies various procedural failures including lack of notice and an opportunity for plaintiffs to oppose reopening of the BAR decision and refusal of the Commissioners to provide adequate reasons for overriding the BAR.

Defendant counters that the decision to remove plaintiffs was not arbitrary and capricious, but was supported by substantial evidence. It would have the court find that the penalty of removal was reasonable, and that the CSC decision was not procedurally defective.

Because we find the penalty of dismissal unduly harsh in the instant fact situation, we hold for plaintiffs.[1]

Initially, we note that there is substantial evidence in the record to find plaintiffs guilty of failing to file tax returns in a timely manner. In fact, both plaintiffs had conceded during the course of the proceedings below that they had not timely filed the tax returns in issue. Our review of administrative determinations is limited to a finding of substantial evidence supporting the decision. *See, e.g., Peters* v. *United States*, 187 Ct. Cl. 63, 408 F. 2d 719 (1969); *Powers* v. *United States*, 169 Ct. Cl. 626 (1965). In the present situation, there is adequate evidence to show that plaintiffs were guilty of failure to file tax returns in a timely manner. Some punishment was clearly warranted.

However, plaintiffs have more than adequately demonstrated that the penalty of dismissal was in no way warranted given the circumstances of this case.

We start our inquiry into the propriety of the penalties by again stating the standard for review of administrative sanc-

[1] Since our decision is based on the harshness of the penalty, we do not reach plaintiffs' rational nexus argument. The procedural argument has been considered, *infra*, in connection with the invalidity of the penalty.

tions. In an overall sense, it is well established that the penalty for employee misconduct is a matter usually left to the sound discretion of the executive agency. *See, e.g., Hoover* v. *United States*, 206 Ct. Cl. 640, 513 F. 2d 603 (1975); *Birnholz* v. *United States*, 199 Ct. Cl. 532 (1972); *Cook* v. *United States*, 164 Ct. Cl. 438 (1964). However, if the punishment exceeds the range of sanctions permitted by statute or regulation, *Daub* v. *United States*, 154 Ct. Cl. 434, 292 F. 2d 895 (1961); *Cuiffo* v. *United States*, 131 Ct. Cl. 60, 68, 137 F. Supp. 944, 949 (1955), or if the penalty is so harsh that it amounts to an abuse of discretion, *Heffron* v. *United States*, 186 Ct. Cl. 474, 484, 405 F. 2d 1307, 1312 (1969); *Jacobowitz* v. *United States*, 191 Ct. Cl. 444, 458–59, 424 F. 2d 555, 563 (1970), it cannot be permitted to stand.

In the case at bar, plaintiffs do not allege that dismissal fell outside the range of penalties prescribed for failure to file tax returns in a timely manner. However, they contend that in light of all the facts, the penalty of dismissal was "unconscionably disproportionate." We agree.

In *Power* v. *United States*, 209 Ct. Cl. 126, 531 F. 2d 505 (1976), plaintiff, a GS–9 ammunition inspector, had been found guilty on two relatively minor charges of submitting false information in connection with claims for travel expense reimbursement. He had been absolved of guilt on a major accusation. Still, the agency dismissed him based on its finding of culpability because of the lesser charges. We reversed, pointing out that the penalty did not fit the crime. Our decision was founded on four factors. First, the evidence supporting guilt was so slim and the *de minimis* nature of the amounts concerned made it extremely doubtful that plaintiff had knowingly and wilfully submitted false information. Second, certain procedural aspects of the case made the penalty appear unduly harsh: the agency had delayed over a year in bringing the charges and by joining the two minor charges with an unsupported serious allegation, it appeared that dismissal for the lesser offense might have been the vehicle for removing plaintiff where the agency was convinced that plaintiff was guilty of the serious act, but could not prove it. Third, defendant attempted but completely failed to demonstrate that the maximum penalty was necessary to deter expense account "padding." Finally, plaintiff

had an unblemished record of 25 years of Government service. In such circumstances, we concluded that it was an abuse of discretion for defendant to impose the penalty of dismissal. The sanction was "so harsh and unconscionably disproportionate to the offense that it could not be permitted to stand."

In sharp contrast stands the case of *Rifkin* v. *United States*, 209 Ct. Cl. 566 (Decided April 14, 1976). There, a GS–12 employee stationed in Germany had deliberately, wilfully and intentionally altered travel documents to show his appointment as a GS–13 in order to obtain First Class steamship passage on a return trip to the United States. Plaintiff admitted the offense and justified his conduct only by saying that he did it in a moment of weakness. There was no procedural problem with the agency's handling of the case (no undue delay in bringing the charges; no major charge which was dropped). Under those facts, the court held that the penalty of dismissal was not unconscionably disproportionate (despite the fact of plaintiff's satisfactory record of 23 years of Government service) and that the agency's exercise of discretion was proper.

First, on balance, it is extremely doubtful that plaintiffs knowingly, intentionally and wilfully failed to file tax returns in a timely manner. The charges against plaintiffs were for failure to file returns in a timely manner, *not* for wilful failure to file and *not* for a wilful attempt to evade taxes. As in the *Power* case, defendant fails to show that the amount of taxes involved is anything but *de minimis*. Indeed, it appears that all of Mrs. Dixon's returns involved refunds. Many, if not most, of Mrs. Boyce's returns also involved refunds. It is incredible to believe that one would intentionally delay filing a tax return in order to delay receipt of a tax refund.

Moreover, both plaintiffs argued and the IRS never rebutted the fact that they delegated their filing responsibility to their husbands. While such reliance obviously cannot be justified, this shortcoming goes to proof of guilt—not to the propriety of the penalty. While plaintiffs cannot evade responsibility for their failure to timely file by reliance on their husbands, such reliance does relate to the wilfulness of their action. In the present circumstances, such reliance demon-

strates that plaintiffs' failures were not intentional, but arose from a misguided belief that their husbands would "take care of" the returns. Such conduct cannot be sanctioned, but in imposing a penalty for such conduct, the agency must take some notice of the realities of modern life, the complexities involved in filing tax returns, the fact that most returns by married individuals are joint returns, and that generally, one spouse will rely on the other to execute the forms.

Even the Internal Revenue Code demonstrates a leniency for "unsuspecting spouses." Section 6013(e) of the Internal Revenue Code [2] provides that in certain circumstances, the spouse who did not know or have reason to know of an omission of income and did not derive substantial benefit therefrom, will be relieved of liability. Certainly the instant case provides a close analogy to this philosophy of leniency expressed in the Code.

In short, while plaintiffs cannot escape responsibility for failure to file tax returns in a timely manner by relying on their spouses, such inadvertent conduct should be reflected in the penalty imposed. Defendant is not justified in imposing the same penalty for an individual who misguidedly relies on his or her spouse to file tax returns as it would for an employee who intentionally declines to file or falsely files in order to evade his taxes. Yet the IRS has done so in the instant case by imposing the ultimate sanction of dismissal. Again, the penalties emerge as unconscionably harsh.

In addition, the nature of plaintiffs' employment presents a clear inference that any shortcomings were not knowing, intentional or wilful. Mrs. Boyce was a seasonal GS–2 data transcriber, and Mrs. Dixon a GS–3 file clerk. One cannot say (as with Mr. Rifkin, a GS–12 who tried to make himself a GS–13) that they knew it was improper to rely upon their husbands to file the tax returns. This is not the case of an audit agent or a managerial employee who intentionally claims deductions or expenses to which he is not entitled. (*See, e.g., Hoover* v. *U.S.*, 206 Ct. Cl. 640, 513 F. 2d 603 (1975)). This is the case of two low-level IRS employees who improperly, but without intent to hurt the Government, relied on their husbands to file their tax returns.

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[2] Int. Rev. Code of 1954, § 6013(e).

Accordingly, it is plain that neither Mrs. Boyce nor Mrs. Dixon failed timely to file tax returns knowingly, wilfully or intentionally. This factor must, of necessity, be taken into account in evaluating the propriety of the penalties imposed by defendant.

Second, there are procedural elements in the record of this case which, although not in and of themselves providing a basis for reversal, clearly enter into any justifications of the penalties meted out to plaintiffs. In *Power*, *supra*, two minor charges were joined with a serious and significant accusation. The serious count failed, but the harsh penalty of dismissal for only the minor charges suggested that the Government discharged plaintiff based on its continuing, unsupported belief that he was really guilty of the serious offense. Moreover, in *Power*, there was a one-year delay in bringing the charges. Such facts had a distinct bearing on the severity of the allowable sanction.

In the case at bar, both the CSC Regional Office and the BAR held specifically that plaintiffs' conduct did not justify dismissal. However, the CSC Commissioners reopened the case and reversed. Plaintiffs argue that the procedures involved in reopening the BAR decision failed to satisfy the requisites of fundamental fairness mandated by the Constitution. We need not reach the merits of this contention. However, even if the technicalities of due process were properly complied with, we must note that the manner of dealing with plaintiffs' case of necessity interrelates with the severity of the penalty imposed. Given the unusual nature of the CSC Commissioners' action in reopening the BAR decision and the narrow situations in which such reopening is justified,[8] the CSC must be careful to observe the basic dictates of fairness in such instances, particularly where an extremely harsh penalty is sought by the agency.

Moreover, balanced against the rather lengthy discussions by the BAR in its opinion (for the decision that dismissal

[8] 5 C.F.R. § 772.310 (1976) provides the procedure and the instances where a BAR decision may be reopened. In the case at bar, it appears that plaintiffs' cases were reopened primarily for the precedential value which would attach to the dismissal of these two ladies. Letter from IRS Comm'r. Donald C. Alexander to CSC Chairman Robert E. Hampton, Aug. 23, 1973. In such instance, the CSC should have been extremely careful to accord plaintiffs' full participation in its decision to reopen the cases.

was too severe), we find the illumination provided by the CSC Commissioners for their reversal of the BAR to be dim. The only phrase remotely cognizable as the basis for the CSC action is in the nature of a conclusion rather than reasons for justifying its action:

> In making their decision to uphold the removal actions taken in the two cases, the Commissioners determined that the charges which were sustained were of sufficient gravity to warrant the penalties of removal. * * * [CSC letter, May 8, 1974].

The CSC letter contains no discussion of the offenses, no discussion of the duty performances of plaintiffs, and significantly, no discussion of *intent*, a factor which caused the BAR to hold the penalty of dismissal too severe.

Recently, in *Craft* v. *United States*, 210 Ct. Cl. 170, 180, 544 F. 2d 468, 473-74 (1976), we were confronted with a case in which a Physical Review Council reversed a Physical Evaluation Board and failed to provide reasons for its action. In that case, the reviewing agency was required by regulation to give reasons for its action. We noted that where the agency fails to give reasons, the court cannot accord the usual deference to the exercise of administrative discretion. Although in the instant case there is no mandatory requirement for the CSC to give reasons for its reversal of the BAR (thus failure to give reasons is not in and of itself a basis to reverse the CSC), we reemphasize that in order to accord the usual degree of finality to the CSC decision, the reasons for the decision should be enunciated. *See, e.g., Kowal* v. *United States*, 188 Ct. Cl. 631, 643, 412 F. 2d 867, 873 (1969).

In short, in the instant case, the CSC reopened the decision of the BAR without affording full participation rights to plaintiffs to argue against the reconsideration. More importantly, the CSC reversed the BAR and found the penalties of dismissal appropriate without providing reasons for its decision. In such a situation, it is impossible to conclude that the CSC properly exercised its discretion because we cannot ascertain the basis for its decision.

Finally, we come to what appears to be the real basis for the CSC's reversal of the BAR: deterrence and concern with

the public image of the IRS. The IRS letter requesting the CSC reopening stated:

> I believe these two appeal decisions will establish dangerous precedent for us in the important tax area. * * * Neither the employee who knowingly fails in his tax responsibilities nor the employee who is grossly negligent in attending to them belongs in an agency whose mission is the collection of taxes. * * * [Letter from IRS Comm'r. Donald C. Alexander to CSC Chairman Robert E. Hampton, Aug. 23, 1973 at 10.]

In the *Power* case, defendant attempted to justify removal based on a goal of deterrence. We stated that "[d]eterrence can be an effective method of preventing fraud upon the Government." This is true. The matter is even more crucial when we are confronted with misconduct by IRS employees. Theirs is a highly visible agency which is "rightly concerned with the image of honesty and integrity." *Birnholz*, *supra*, 199 Ct. Cl. at 537; *Hoover*, *supra*, 206 Ct. Cl. at 646, 513 F. 2d at 606. However, as we stated in *Power*, a penalty can be so harsh as to "effectively ruin defendant's goal of deterrence."

Should a powerful government agency seek the severe penalty of dismissal for every *de minimis* offense, not only might the goal of deterrence suffer, but potential employees might equally be deterred from seeking positions with the agency. Further, a reputation for gross unfairness generated by such dismissals could have a much more harmful impact on the public image of the IRS than would carrying a person on the payroll who has failed to file income tax returns.

In addition, imposing the same penalty on two low-level employees who unintentionally fail to file tax returns in a timely manner by relying on their spouses, as on an IRS tax technician who "culpably, for his own benefit" overstates tax deductions creates a dangerous precedent.

In short, an unconscionably disproportionate penalty aids neither the goal of deterrence nor the image of the IRS. "If a penalty is so harsh as to constitute an abuse, rather than an exercise of discretion, it cannot be allowed to stand." *Power*, *supra; Jacobowitz*, *supra*. In the instant case, like *Power*, plaintiffs' offenses in no way justified removal. "Their punishment did not fit their crime."

Concurring Opinion by Judge Nichols

In summary, this is another case where the penalty is "so unconscionably disproportionate that it becomes an abuse of discretion." Plaintiffs with 12 and 13 years of satisfactory service respectively, were removed for failure to file tax returns in a timely manner. Plaintiffs were GS–2 and GS–3 employees who relied upon their husbands to file the returns. Defendant has not shown that they benefitted in any way from their shortcomings. To the contrary, it appears that they were denied timely tax refunds. Accordingly, it is extremely doubtful that plaintiffs' improper conduct was in any way wilful, knowing or intentional. Moreover, two separate reviews of the decision to dismiss plaintiffs concluded that such a penalty was too harsh. Yet the CSC Commissioners, without providing reasons, reopened the case and reinstituted the penalty. In such circumstances, the CSC determination cannot be accorded its usual deference. Finally, given these facts, the penalty cannot be justified either under a goal of deterrence or as a means to maintain a proper agency image.

Again, we reemphasize that generally, agency penalties will be viewed as a matter within agency discretion. However, in the facts of the instant case such discretion has been abused due to the disproportionate harshness of the penalty. *Contrast Pascal* v. *United States*, *post* at 183.

Accordingly, plaintiffs' motion for summary judgment is granted, and defendant's cross-motion for summary judgment is denied. Judgment is entered for plaintiffs. Pursuant to the authority granted to the court in 28 U.S.C. § 1491, as amended by Pub. L. 92–415, plaintiffs are ordered to be reinstated.[4] The case is remanded to the Trial Division for further proceedings under Rule 131(c) to determine the amount to be awarded plaintiffs consistent with this opinion.

NICHOLS, *Judge*, concurring:

I join in the decision and in Judge Kunzig's opinion, except that I take exception in particulars that are stated below, which seem to me important.

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[4] Nothing in this opinion is intended to contravene the discretionary authority of the Commissioner of Internal Revenue to administer an appropriate penalty such as that originally proscribed by the BAR.

1. Certainly an administrative decision loses much of its weight on judicial review if no reasons for it are given. However, it may expressly or by implication adopt the prevailing party's statement. Here the Civil Service Commission has, I think, adopted as its own, by implication, IRS Commissioner Alexander's letter protesting the BAR decisions concerning Boyce and Dixon. If we are to fault a lack of reasons for the CSC decision, we cannot ignore the articulation given in that letter.

2. I am not much impressed with the fact that plaintiffs relied on their husbands to prepare and file joint tax returns. They had actual notice their husbands could not be relied on to file returns on time. Dixon had a reprimand in her file on this account, though it was not considered in assessing the penalty. The BAR, however, mentions it. The Alexander letter says Boyce was the sole support of her family, for which she assumed full financial responsibility. Though some might read this as an argument for Boyce, it does to some degree undermine her right to rely on Mr. Boyce. She received the W–2's, the usual signal to prepare a return.

3. Mr. Alexander ignores the fact that so many of the returns were refund returns. In my view, an assessment of the actual and potential loss of revenue would be an indispensable component of an informed and reasoned decision on the penalty in this kind of case.

4. I question the propriety of lumping into the charges, without distinction, delinquencies in filing Federal and State returns. It is up to the States to enforce their own tax laws. If state taxes are not paid, taxpayers cannot take deductions for them on Federal returns. The two types of infringements are not the same. To lump them together in the charge makes a superficial impression of utter lawlessness, which a better acquaintance with the State's assessment and collection procedure perhaps might in large measure dispel.

5. The BAR makes what appears to me a valid point: though employees were warned they must satisfy their tax obligations, and that the agency will discipline them if they don't, there is no express warning in the involved Bulletins that dismissal will be the automatic penalty, always or in any specified kind of case. The issue is, therefore, not like *Heffron*

v. *United States*, 186 Ct. Cl. 474, 405 F. 2d 1307 (1969) wherein we upheld a severe penalty, dismissal, for a relatively minor offense, in part because the employees had all been warned by circular, only two months before the violation, that there would be no second chance; dismissal would follow even a first offense. For the BAR or us to hold for the employee there would have been to pull the rug from under management's feet. Likewise in *Birnholz* v. *United States*, 199 Ct. Cl. 532 (1972), the plaintiff had received warnings committing the agency to a severe reaction in case he offended again. In contrast, Mr. Alexander is weak on this issue, alleging that Boyce's offense is the most aggravated ever encountered in an appeal to the Commission (a matter of judgment, surely) and that employees had ample notice not to commit it, but not answering the BAR's specific point. He does not assert that every tax delinquency demands removal. If the offenses do not appear as relatively horrendous to others as they do to Mr. Alexander, his argumentative structure loses its linchpin, where as in *Heffron* this issue was virtually mooted.

6. The really vital controversy between the BAR and Mr. Alexander is that the former concedes—as all must— the need for a particularly high standard of conformity to tax laws by IRS employees in managing their personal finances, but does not extend it to Boyce and Dixon because they "had no contact with the public." Presumably, therefore, for them the standards are those which any Government agency might reasonably demand of GS–2 and GS–3 employees. Mr. Alexander says the same rigid standards apply to GS–2 and GS–3 file clerks in the IRS as to GS–11 agents because they work "in a direct support of those employees who do contact the public."

The "meets the public" canon does not appear to me as reasonably defining the proper line between the high IRS standard and the lower, though still demanding one, applicable to those employed in more neutral activities. Meeting the public is a duty, not a privilege, and there are some high ranking persons in the IRS, I believe, who do not normally meet the public in course of doing their jobs. The damage one of these would cause, if he were known to be habitually tax

delinquent, would not be less. Whether tax delinquency by an IRS employee produces an adverse public reaction, destructive of the agency's capacity to perform its mission, does not depend on and is not confined to the persons he actually meets in line of duty. *Cf. Wathen* v. *United States*, 208 Ct. Cl. 342, 368, 527 F. 2d 1191, 1207 (1975), *cert. denied*, 429 U.S. 821 (1976).

On the other hand, even in Mr. Alexander's eyes there are apparently some IRS employees who do not come under the rigid standard because they neither meet the public nor work in support of those who do.

Both contenders appear to me too mechanical and simplistic in the rules they would apply. The public would form an adverse judgment on the entire agency and the program it administers, from the tax malfeasance of an individual, or would not do so, depending on the individual's rank in the IRS, his pay, his experience, the extent to which the agency relies on his honesty, his performance of discretionary functions, and his exercise of professional judgment. Not just meeting the public, but having transactions on the agency's behalf with members of the public, would be another factor, no doubt. The public would not draw the same conclusions from the delinquencies of Boyce and Dixon, and from similar ones which, in a purely hypothetical case, might be committed by a couple of deputy commissioners. Mr. Alexander himself, one surmises, would not listen with patience to a deputy commissioner, caught in *flagrante delicto*, who might tell him the penalty should not depend on rank, but should be for him the same as for a GS–2 clerk.

7. I recognize our recent holding in *Wathen*, *supra*, that "efficiency of the service" is for agency definition, but that case of course does not impair authority of the cases Judge Kunzig relies on, that an extreme disproportion between offense and punishment is an abuse of discretion and will be reversed as illegal. Mr. Alexander's stated rule requiring disregard of the most relevant factors in fixing the penalty of an IRS employee for tax delinquency is itself arbitrary and capricious and makes arbitrary and capricious any CSC decision that relies upon it.

Syllabus

8. Of course I agree that some disciplinary action was necessary as both Boyce and Dixon had committed serious infractions of the rules of conduct. The suspensions proposed by the BAR seem reasonable. The Commission was arbitrary and capricious in reversing the BAR for the improper reasons, suggested to it in the Alexander letter, whether or not it might have done so for proper ones. I agree that nothing we hold is intended to contravene the discretionary authority of the Commissioner of Internal Revenue to administer an appropriate penalty such as the BAR originally prescribed.

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544 F. 2d 478

PACIFIC FAR EAST LINE, INC. v. THE UNITED STATES

[No. 214–70. Decided October 20, 1976]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Taxes; income tax; investment credit; operating-differential subsidy agreements; payments from tax-deferred income from reserve funds.—Plaintiff, a contractor under Maritime operating-differential subsidy agreements, seeks to recover income taxes and deficiency interest paid for tax years 1962, 1963 and 1964. This phase of the case concerns the application of the investment tax credit provisions of the Internal Revenue Code of 1954 and implementing regulations and rulings. The amounts at issue are payments by plaintiff of tax-deferred income from its reserve funds (required by 46 U.S.C. § 1177 (1964) to be maintained to insure vessel replacement) for the ships it placed in service in 1962 when considered in light of tax closing agreements of 1947, 1954 and 1964. The issues are: whether from plaintiff's cost of the ships should be deducted that portion derived from tax deferred earnings deposited in the reserve funds to arrive at plaintiff's qualified investment for the investment credit, and whether from plaintiff's qualified investment should be deducted the amount of subsequent mortgage payments made by plaintiff from tax-deferred earnings. It is *held* (1) that plaintiff's qualified investment for investment tax credit purposes is its cost of the ships to plaintiff whatever the source of the money, i.e. the tax-deferred income in the reserve funds. It is also *held* (2) that, in view of (1) above, it must follow that the same rationale pertains to the payments from tax-deferred funds to reduce the mortgages. Defendant's motion for summary judgment is denied and plaintiff's cross-motion is granted, the amount of recovery to be determined in further proceedings.

Syllabus

Taxes; income tax; credits against tax; investment credit in depreciable property; legislative intent.

[1] The legislative purpose in providing for a credit for investment in certain depreciable property, in the case of both regulated and non-regulated industries, was to encourage modernization and expansion of the Nation's productive facilities and to improve its economic potential by reducing the net cost of acquiring new equipment, thereby increasing the earnings of the new facilities over their productive lives.

Internal Revenue ⊜ 754

Taxes; income tax; credits against tax; investment credit in depreciable property; legislative intent.

[2] Where the purpose of an act is specially treated, departure from the purpose defeats the legislative intent. Thus, where it was the legislative intent that a credit for investment in certain depreciable property applies to both regulated and non-regulated industries, the special reference in H.R. Report No. 2508, 87th Cong., 2d Sess., 14, to *regulated* industries should not be considered lightly.

Internal Revenue ⊜ 754

Taxes; statutes; construction and operation; remedial legislation; investment credit in depreciable property.

[3] In applying various sections of the investment credit statute, the Revenue Act should be interpreted liberally in keeping with its purpose.

Internal Revenue ⊜ 754

Taxes; income tax; credits against tax; investment credit in depreciable property.

[4] In determining whether plaintiff's investment in its ships qualifies for investment tax credit, Secs. 38 and 46–48 of the Code, as well as the legislative history and implementing Treasury regulations, do not state that "qualified investment" should exclude investment funds derived from untaxed, tax-exempt or tax-deferred income, and absent such restriction, there is no warrant for creating one. The cost of property to the taxpayer is the amount of money that he paid to acquire the property, whatever the source of the money.

Internal Revenue ⊜ 754

Taxes; income tax; credits against tax; investment credit in depreciable property; legislative intent.

[5] Where invested funds are derived from income on which the taxpayer's taxes have been reduced by an investment credit on other

Syllabus

property, as demonstrated by S. Rep. No. 1881 at 11–12 Congress explicitly contemplated that a further credit should be allowed on the reinvestment.

Internal Revenue ⊜ 754

Taxes; statutes; construction and operation; generally.

[6] The tax statutes and regulations must be applied as written and without any equitable consideration of the desirability of offsetting prior tax benefits.

Internal Revenue ⊜ 121, 171

Taxes; income tax; credits against tax; investment credit in depreciable property; legislative intent.

[7] A method for computing investment tax credit wherein only such of the investment is qualified investment as does not have its source in tax-deferred income on deposit in the reserve funds required by 46 U.S.C. § 1177 (1964) would be inconsistent with the legislative purpose to increase the profitability of the investment.

Internal Revenue ⊜ 1288.1

Taxes; income tax; credits against tax; investment credit in depreciable property; legislative intent.

[8] The legislative history relating to the investment tax credit indicates that transportation industries, regulated and nonregulated, were to receive such credit.

Internal Revenue ⊜ 754

Taxes; Treasury regulations; Sec. 38 property; depreciation allowable.

[9] Treas. Reg. § 1.48–1(b)(2) (1964) is inapplicable to property such as the subject ships purchased by plaintiff under operating-differential subsidy agreements and used 100% in its trade or business.

Internal Revenue ⊜ 754

Taxes; income tax; credits against tax; investment credit in depreciable property.

[10] Since the 1947 and 1954 tax closing agreements were entered into many years prior to enactment of the investment tax credit, the parties did not anticipate the tax credit, and thus the agreements to accept reduction in basis for depreciation, gain and loss purposes did not constitute a waiver of benefits conferred by the subsequent investment tax credit. Therefore, for purpose of the investment tax credit enactment, the basis provisions of the closing agreements are inoperative, and basis or qualified investment for calculation of the credit is to be determined under the investment

tax provisions without reference to those provisions of the agreements.

Internal Revenue ⇐ 754

Taxes; statutes; construction and operation; new enactment, effect of.

[11] A new enactment on a subject is to be taken as intended to fit into the existing system and to be given a conforming effect unless a different purpose is plainly shown. Thus, when Congress included in the Revenue Act of 1962 the special provision relating to documented vessels purchased under operating and construction subsidy agreements, it was the intent that the investment tax credit fit into the existing system which necessarily included the Merchant Marine Act of 1936 and the special depreciation arrangement as provided in the closing agreements.

Internal Revenue ⇐ 754

Taxes; Revenue Rulings; binding effect of.

[12] A Revenue Ruling may be helpful in interpreting a statute, but it is not binding on the Secretary or the courts. It does not have the effect of a regulation or a Treasury decision.

Internal Revenue ⇐ 1202

Taxes; income tax; credits against tax; investment credit in depreciable property; mortgage payments from reserve funds.

[13] Since the court has determined that the tax-deferred source of the funds used to originally acquire the subject ships does not affect their bases for the investment tax credit, it must follow where such funds are used to reduce the mortgages thereon. Once the bases of the ships are determined and the investment credit calculated, the tax-deferred nature of the funds used to subsequently pay off the mortgages is irrelevant.

Internal Revenue ⇐ 754

Mark P. Schlefer, attorney of record, for plaintiff. *T.S.L. Perlman*, *Leonard Egan*, *Stephen T. Owen*, *Kominers*, *Fort*, *Schlefer & Boyer*, of counsel.

Fenton P. Wilkinson, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. *Theodore D. Peyser* and *Robert S. Watkins*, of counsel.

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG, and BENNETT, *Judges*, *en banc*.

KASHIWA, *Judge*, delivered the opinion of the court:

This tax refund action concerning the investment tax credit provisions of the Internal Revenue Code of 1954, §§ 38,

46–48,[1] has previously been before this court. On March 19, 1975, this court granted plaintiff's motion for partial summary judgment, holding that plaintiff's credit should have been computed upon its entire bases in the ships, rather than upon only a ratable portion attributable to construction work done in 1962 as defendant contended. *Pacific Far East Line, Inc.* v. *United States*, 206 Ct. Cl. 378, 513 F. 2d 1355 (1975).[2] We shall hereinafter refer to said March 19, 1975, opinion as the first opinion.

The case is again on cross motions for summary judgment and raises the following two questions reserved by the first opinion:

> 1. Whether from plaintiff's cost of the ships should be deducted that portion derived from tax deferred earnings deposited in plaintiff's reserve funds to arrive at plaintiff's qualified investment for the investment credit?
> 2. Whether from plaintiff's qualified investment should be deducted the amount of subsequent mortgage payments made by plaintiff from tax deferred earnings?

Affidavits have been filed by plaintiff in support of its motion for summary judgment. The pleadings and the affidavits filed show that there is no genuine issue of material fact. For the reasons stated below, we grant plaintiff's motion for summary judgment and deny defendant's cross motion.

Plaintiff has been, continuously since 1953, a contractor under operating-differential subsidy agreements with the Federal Maritime Board and the Maritime Administration (hereinafter either will be referred to as Maritime).[3] "To insure * * * the replacement of the contractor's subsidized vessels as may be required," § 607 of the Merchant Marine

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[1] All section references are to the Internal Revenue Code of 1954 unless otherwise noted. All statutory references in this opinion regarding the Internal Revenue Code refer to applicable provisions in force for the years in question, 1962, 1963, and 1964.

[2] In its companion case, *Lykes Bros. S. S. Co.* v. *United States*, 206 Ct. Cl. 354, 513 F. 2d 1342 (1975), judgment was also entered in favor of the plaintiff taxpayer.

[3] For a description and the purpose of the operating-differential subsidy program, see, e.g., *Moore-McCormack Lines, Inc.* v. *United States*, 188 Ct. Cl. 644, 413 F. 2d 568 (1969); *American Export Isbrandtsen Lines, Inc.* v. *United States*, 204 Ct. Cl. 424, 499 F. 2d 552 (1974); *Farrell Lines Inc.* v. *United States*, 204 Ct. Cl. 482, 499 F. 2d 587 (1974); *Pacific Far East Line, Inc.* v. *United States*, 184 Ct. Cl. 169, 394 F. 2d 990 (1968). As the program relates to the investment credit, see *States S. S. Co.* v. *United States*, 192 Ct. Cl. 795 428 F. 2d 832 (1970).

Act of 1936 (MMA) required contractors, including plaintiff, to create and maintain a "capital reserve fund." 46 U.S.C. § 1177 (1964). In this fund plaintiff was required to deposit amounts equal to (1) the annual depreciation charges on its subsidized ships, (2) insurance proceeds from losses of subsidized ships, (3) the proceeds of sales of such ships, and (4) certain portions of its net profits, *viz.* (a) half of all profits in excess of 10 per cent per annum, (b) such further portion as Maritime might deem necessary to build up a vessel replacement fund and (c) such further portion as the contractor might elect with Maritime's approval. From the "capital reserve fund" the statute permitted the contractor to "make disbursements for the purchase of replacement vessels" and to "pay the principal, when due, on all notes secured by mortgage on the subsidized vessels." 46 U.S.C. § 1177(b) (1964).

Also, "to insure the continued maintenance and successful operation of the subsidized vessels" the contractor must create a "special reserve fund" into which he shall deposit certain excess profits. 46 U.S.C. § 1177(c) (1964). The statute went on to provide (46 U.S.C. §§ 1177 (f), (h) (1964)) that upon the termination of the subsidy contract "the reserve funds * * * shall be the property of the contractor * * *." and that "[t]he earnings * * * deposited in the contractor's reserve funds as provided in this section * * * shall be exempt from all Federal taxes." (Hereinafter, capital reserve fund and special reserve fund will be referred to collectively as reserve funds.)

In 1947, several years before plaintiff became subsidized, shipowners then subsidized entered into tax closing agreements with the Commissioner of Internal Revenue (Commissioner). Those closing agreements provided that all earnings after 1946 deposited in the lines' reserve funds should be "tax-deferred income." [4] The closing agreements defined tax deferred as meaning the income is not taxed but is not recognized in "cost basis" or "invested capital." This provision contained the following proviso: "provided, however, that the

[4] Deposits of pre-1943 income and capital gains were agreed to be exempt; deposits of 1943–1945 ordinary income were agreed to be taxable but the lines were given an election not to be taxed on deposited capital gains of those years, in which event the gains were to be included in cost basis but not in invested capital.

taxpayer shall not be bound by this commitment beginning with the calendar year in which a decision of any court, sustaining the contention that Section 607(h) of the Act [MMA] gives a tax exemption, instead of a Tax-deferment as herein provided, shall become final." The closing agreements contained other provisions concerning the time of accrual of deposits, investment income of the reserve funds, the useful life of vessels for depreciation, and the allocation of funds between income and capital items.

In 1952, after plaintiff had applied for a subsidy, Maritime offered it a subsidy contract providing in part that "No subsidy accrued hereunder shall be paid * * * unless the Operator is * * * a party to * * * a Closing Agreement similar in scope and effect, so far as applicable, to the Closing Agreements with the then subsidized Operators approved July 21, 1947 * * *." Although it had no dispute with the Internal Revenue Service (IRS), plaintiff had no choice but to apply for and execute a closing agreement, in order to obtain the subsidy accruing to it. The Commissioner approved the agreement on April 13, 1954.

Like its predecessors, plaintiff's closing agreement provided that all earnings deposited in the reserve funds would be "tax-deferred income" but that plaintiff would be relieved of the commitment when a court decided that § 607(h) of the MMA exempted the income from taxes. Pertinent provisions of plaintiff's closing agreement read as follows:

> "Tax-deferred" or "Tax-deferment" referring to ordinary income and capital gains deposited in Reserve Funds means that such items are not to be recognized as taxable income, except as provided in paragraph VI(c) hereof, and likewise are not to be recognized in the determination of cost basis or invested capital.
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> * * * * *
>
> All earnings including capital gains, (not tax exempt under the Internal Revenue Code), which are deposited in the taxpayer's Reserve Funds, shall be tax-deferred income; provided, however, that the taxpayer shall not be bound by this commitment beginning with the calendar year in which a decision of any court, sustaining the contention that Section 607(h) of the Act [MMA] gives a tax exemption, instead of a Tax-deferment as herein provided, shall become final.

Plaintiff's agreement also tracked the 1947 agreements in its provisions for useful life, accrual of deposits, investment income, and allocation of the reserves. In 1964 plaintiff entered into a new closing agreement merely changing the useful life of ships from 20 years to 25 years. We shall hereafter refer to plaintiff's closing agreements as the 1947 agreement because in substance they are the identical agreements that the other shipowners entered into in 1947.

From the beginning of its subsidized operations, in accordance with § 607 of the MMA, plaintiff made periodic deposits in its reserve funds. These included amounts equal to its depreciation expense on the subsidized ships and portions of its earnings.

In 1959, pursuant to the replacement provisions of its subsidy contract, plaintiff and Maritime contracted with Bethlehem Steel Company for the construction of the ships *Philippine Bear* and *China Bear*. While they were under construction the Revenue Act of 1962 providing for the investment credit was enacted. Bethlehem delivered the ships in 1962 and they then entered the plaintiff's subsidized service. Plaintiff used them in its business of carrying cargo for hire between United States ports on the West Coast and the Far East.

Plaintiff paid $14,558,925 for the ships.[5] It financed these payments with $10,274,557 borrowed on the security of mortgages on the ships and $4,284,368 cash down payment from its own funds. The down payment included $1,406,416 of reserve funds moneys attributed to plaintiff's deposits of earnings treated as "tax-deferred" and $2,877,952 of plaintiff's general moneys and reserve funds moneys attributed to deposits of funded depreciation or other forms of capital.

Since delivery of the ships plaintiff has made periodic payments of principal and interest on the mortgages. These payments were in part drawn from the reserve funds. The source of the reserve funds moneys included $1,912,332 allocated to plaintiff's earlier deposits of tax deferred earnings.

[5] The total cost of the two vessels was $27,931,945, of which $13,373,020 was paid to Bethlehem by Maritime as construction-differential subsidy and as payment for national defense features built into the vessels at the instance of the Navy.

In filing its federal income tax returns for 1962, 1963, and 1964,[6] plaintiff claimed an investment credit of $999,479, seven per cent of $14,278,270, which it then computed as its qualified investment eligible for the investment tax credit.[7] On audit the IRS reduced the credit to $146,410, then "recaptured" $20,795 of that sum. The reduction reflected (i) the elimination of the portion (84.7 per cent) of plaintiff's cost that the IRS attributed to construction work before January 1, 1962, and (ii) the elimination of a further part of the cost on account of the $1,406,416 that had been part of plaintiff's down payment for the ships, that was drawn from the reserve funds, and that in accounting for those funds was allocated to tax deferred earnings. The "recapture" reflected (iii) the elimination of a still further part of the cost on account of $1,912,332 of plaintiff's mortgage payments in 1962, 1963, and 1964 that had been drawn from its reserve funds and had been allocated to tax deferred earnings. The IRS issued a deficiency notice accordingly. Having paid the deficiency and having filed a claim for refund in the amount of $791,927.60, which was denied, plaintiff brought this action.[8] This court in its first opinion held that plaintiff's cost attributable to pre-1962 construction could properly be considered for the investment credit computation. The amounts which are presently at issue are payments by the plaintiff of tax deferred income from its reserve funds for the two ships it placed in service in 1962.

The issues are:

1. Whether the basis for the investment credit is plaintiff's cost or whether from that cost must be deducted

[6] The credit was spread over three years by operation of carry-forward provisions of the Code.

[7] This sum included $3,564 investment in property not in issue here, leaving $14,274,706 as its investment in the ships. Later outlays brought the final cost to $14,558,925. Plaintiff's refund claim is predicated on 7 percent of $14,278,270. (Rounded numbers are used in the paragraph in the text and in this footnote.)

[8] A balance of $81,937 unused credit was carried forward by plaintiff to 1965. The total of the $125,614 (The $1 difference is due to rounding.) ($146,410 less $20,795) allowed by the IRS, the refund claim of $791,928, and the carry forward of $81,937 is $999,479, seven percent of the plaintiff's investment. Before the IRS issued the deficiency notice the parties settled by agreement a number of issues affecting plaintiff's taxes for the years in question. The deficiency notice reflected the investment tax credit issues involved here and certain other issues. Plaintiff's refund claim was confined to the investment credit issues and the sums affected by it. (Rounded numbers are used.)

$1,406,416 representing down payments drawn from the reserve funds and allocated to tax deferred earnings, and

2. Whether from the cost should be further deducted $1,912,332 representing subsequent mortgage payments drawn from the reserve funds and allocated to tax deferred earnings.

In order to answer these questions we must first examine the relevant investment tax credit provisions. The investment tax credit sections of the Internal Revenue Code of 1954 are § 38 and §§ 46–48. Section 38 authorizes the allowance of a tax credit in an amount determined under §§ 46–48. Section 46(a)(1) provides:

> The amount of the credit * * * shall be equal to 7 percent of the qualified investment (as defined in subsection (c)).

Subsection (c) (§ 46(c)(1)) provides:

> * * * the term "qualified investment" means * * *
>
> (A) the applicable percentage of the basis of each new section 38 property (as defined in section 48(b)) placed in service by the taxpayer during such taxable year * * *.[9]

Section 48(a)(1) defines "section 38 property" as follows:

> * * * the term "section 38 property" means—
>
> (A) tangible personal property * * *
>
> * * * * *
>
> Such term includes only property with respect to which depreciation * * * is allowable and having a useful life (determined as of the time such property is placed in service) of 4 years or more.
>
> (2) PROPERTY USED OUTSIDE THE UNITED STATES.—
>
> (A) IN GENERAL.—Except as provided in subparagraph (B), the term "section 38 property" does not include property which is used predominantly outside the United States.
>
> (B) EXCEPTIONS.—Subparagraph (A) shall not apply to—
>
> * * * * *

[9] The "applicable percentage" depends merely upon the useful life; in case of a useful life of 8 years or more, the applicable percentage is 100 (§ 46(c)(2)). Section 48(b) defines "new section 38 property" as property built or acquired after 1961 and was construed by this court in its first opinion and in a companion case, *Lykes Bros. S. S. Co.* v. *United States*, 206 Ct. Cl. 354, 513 F. 2d 1342 (1975).

(iii) any vessel documented under the laws of the United States which is operated in the foreign or domestic commerce of the United States;

* * * * *

The investment tax credit reflects the legislature's decision to use the taxing system for economic ends. The credit was proposed by President Kennedy's tax message of 1961 to Congress, suggesting amendments to the tax laws to "increase the modernization, productivity, and competitive status of American industry—to stimulate the expansion and growth of our economy" (H.R. Doc. No. 140, 87th Cong., 1st Sess. 1 (1961)). In his economic report of 1962 the President said (as quoted at H.R. Rep. No. 1447, 87th Cong., 2d Sess. 7 (1962)):

> The centerpiece of these proposals is the * * * credit against tax for gross investment in depreciable machinery and equipment. * * * The tax credit increases the profitability of productive investment by reducing the net cost of acquiring new equipment. It will stimulate investment in capacity expansion and modernization, contribute to growth of our productivity and output, and increase the competitiveness of American exports in world markets.

See, also, H.R. Rep. No. 1447, *supra* at 8; S. Rep. No. 1881, 87th Cong., 2d Sess. 11 (1962).

The conferees who reconciled the Senate and House reports adopted the following statement (H.R. Rep. No. 2508, 87th Cong., 2d Sess. 14 (1962)):

> It is the understanding of the conferees on the part of both the House and the Senate that the purpose of the credit for investment in certain depreciable property, in the case of both regulated and non-regulated industries, is to encourage modernization and expansion of the Nation's productive facilities and to improve its economic potential by reducing the net cost of acquiring new equipment, thereby increasing the earnings of the new facilities over their productive lives.

It is significant that both the House and the Senate in the above statement made special reference to regulated industries and that the major purpose was to reduce the cost of acquiring new equipment. It is common knowledge that regulated industries require expensive equipment costing mil-

lions of dollars. Special reference to regulated industries, therefore, should not be considered lightly. Since the conferees on the part of both the Senate and the House held the same view, we deem the special reference very material in the discussion to follow. Where the purpose of an act is specially treated, departure from the purpose defeats the legislative intent. In *Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84 (1934), the Court stated at 93–94:

> * * * The intention of the lawmaker controls in the construction of taxing acts as it does in the construction of other statutes, and that intention is to be ascertained, not by taking the word or clause in question from its setting and viewing it apart, but by considering it in connection with the context, the general purposes of the statute in which it is found, the occasion and circumstances of its use, and other appropriate tests for the ascertainment of the legislative will. Compare *Rein* v. *Lane*, L. R. 2 Q. B. Cases 144, 151. The intention being thus disclosed, it is enough that the word or clause is reasonably susceptible of a meaning consonant therewith, whatever might be its meaning in another and different connection. * * *

Before we enter into a discussion of issues, we note that this court has held that § 38 and §§ 46–48 should be *liberally* construed and, furthermore, that the purpose of the Revenue Act must be considered in construing these sections.

> * * * In applying various sections of the investment credit statute, this court and other courts have noted that the [Revenue] Act should be interpreted liberally in keeping with its purposes, * * * and this case is no exception. [*Lykes Bros. Steamship Co.* v. *United States*, 206 Ct. Cl. 354, 375, 513 F. 2d 1342, 1353 (1975).]

Alabama Displays, Inc. v. *United States*, 205 Ct. Cl. 716, 724, 507 F. 2d 844, 848 (1974); *Weirick* v. *Commissioner*, 62 T. C. 446, 453 (1974); *Minot Federal Savings & Loan Ass'n* v. *United States*, 435 F. 2d 1368, 1372 (8th Cir. 1970). We shall again follow the rule of liberal construction in the discussion to follow, keeping in mind the purposes of the investment tax credit as above described. In this court's first opinion it incorporated the reasoning in *Lykes Bros.* and this court's opinions in both cases were unanimous. We should not dis-

card the rule of liberal construction midstream. The same statutes and facts are involved herein as in the first opinion.

Plaintiff first argues that plaintiff's investment in its ships qualifies for the investment tax credit irrespective of the source of the funds invested. Defendant responsively contends that only so much of the investment is qualified investment for the investment tax credit as did not have its source in tax deferred income on deposit in the reserve funds. We have weighed the arguments made by both parties. We find plaintiff's arguments more convincing.

We observe that § 46(c)(1), quoted above, defines qualified investment as "the applicable percentage of the basis of each new section 38 property * * *." Both the House Ways and Means Committee and the Senate Finance Committee reported, "The basis of 'new section 38 property' is to be determined under the general rules for determining the basis of property. Thus, the basis of property purchased or constructed would generally be its cost." S. Rep. No. 1881, *supra*, at 143; H.R. Rep. No. 1447, *supra*, at A7.

The Treasury's regulations implementing the investment credit provide (Treas. Reg. § 1.46–3(c) (1964)):

> (c) *Basis or cost.* (1) The basis of any new section 38 property shall be determined in accordance with the general rules for determining the basis of property. Thus, the basis of property would generally be its cost (see section 1012), unreduced by the adjustment to basis provided by section 48(g)(1) * * * and any other adjustment to basis, such as that for depreciation, and would include all items properly included by the taxpayer in the depreciable basis of the property, such as installation and freight costs. * * *[10]

Section 1012, cited by the regulation, provides, "The basis of property shall be the cost of such property, except as otherwise provided in this subchapter * * *." and the Treasury's regulation interpreting § 1012 states, "The cost is the amount paid for such property in cash or other property."

[10] The "adjustment to basis provided by section 48(g)(1)," mentioned in the regulation, was a provision that the amount of the credit was to be deducted from the basis of the property in respect of which the credit was allowed, so that a $100 property on which a $7 credit was allowed would receive a basis of $93 for depreciation, gain, and loss. This reduction was repealed in 1964, and the repeal was given a substantially retroactive effect. Act of Feb. 26, 1964, Pub L. No. 88–272, § 203, 78 Stat. 33.

Treas. Reg. § 1.1012–1 (1957). None of this contains the slightest indication that "qualified investment" should exclude investment funds derived from untaxed, tax-exempt, or tax deferred income. It states that the qualified investment in a "section 38 property" is the basis of that property, that the basis is its cost, and, except for instances not here applicable, that "adjustments" to basis are to be disregarded. We believe that it is fair to say that the "general rules for determining the basis of property," referred to by the House and Senate Committees and the Treasury's regulation, have no reference to whether the funds spent as part of the "cost" of the property had their source in untaxed income. The cost of property to the taxpayer is the amount of money that he paid to acquire the property, whatever the source of the money.

As is true in this case, property is often acquired in whole or part with borrowed money; it is elementary that borrowed money is not taxed when received by the taxpayer from the lender, yet the Government could not—and does not here—contend that the taxpayer's qualified investment in the property is reduced by the amount of borrowed funds invested. The same would be true of an investment consisting in whole or in part of money received as a gift exempt from tax (§ 102), of interest earned by the taxpayer on tax-exempt municipal bonds (§ 103), of income earned abroad on which plaintiff pays no federal income tax because of the "foreign tax credit" (§ 33), or of retirement income subject to a "retirement income credit" (§ 37). Indeed, where the invested funds are derived from income on which the taxpayer's taxes have been reduced by an investment credit on other property, Congress explicitly contemplated that a further credit should be allowed on the reinvestment, for the legislative committees stated, "It is your committee's intent that the financial assistance represented by the credit should itself be used for new investment, thereby further advancing the economy." (S. Rep. No. 1881, *supra*, at 11–12; cf. H.R. Rep. No. 1447, *supra*, at 8.)

In view of the vast array of credits, exemptions, deferrals, deductions, and different rates of tax on income laid down by Congress in intricate detail in the Internal Revenue Code,

it is unthinkable that the amount of the conceptually simple investment credit was intended—without a word of textual support—to be affected by the extent of taxation or the deferral of taxation on income that had produced funds used to make the investment that creates the credit. Such a result would cause the credit to vary in an unpredictable and arbitrary amount depending on all the countless array of prior events that affected taxpayers' effective rates of taxation on income earned years before. The operation of the credit would be infinitely capricious, and the accounting difficulties in tracing funds to their source and ascertaining the extent to which they had been taxed would be staggering. As the Fifth Circuit has said, "We think that the tax statutes and regulations must be applied as written and without any equitable consideration of the desirability of offsetting prior tax benefits." [Footnote omitted.] *Greer* v. *Commissioner*, 230 F. 2d 490, 493–94 (5th Cir. 1956).

Such a method, as defendant propounds, of computing the credit would be inconsistent with the reiterated purpose of its sponsors, to increase the profitability of investment. Any restriction of the credit diminishes its effect in improving the profitability of the investment; that is as true of restrictions resting on the tax deferred character of the funds invested as of any other reduction. In the absence of any provision in the statute for such a restriction, we believe that there is no warrant for creating one.

We see that where Congress has intended to reduce the basis for the credit because of the source of the moneys invested, it has made express provision. An example is § 46 (c) (4), added by the Senate, which provides that where property is destroyed or damaged by casualty, or stolen, and is insured, reinvestment of the insurance proceeds in replacement property is not eligible for the investment credit. The purpose was to prevent a windfall by an investment credit on insurance proceeds where the taxpayer has neither put up new funds nor expanded its business. Outside the sections dealing with the credit, nevertheless, incorporated into the investment credit provisions by § 1012 via § 46(c) (1) and regulations thereunder, § 362(c) (2) provides that if money is contributed to a corporation by a non-stockholder, any

basis of property acquired within one year with such money shall be reduced by the amount of the contribution. In the absence of such expressed provision, Congress must have intended that the basis be the full amount of the moneys invested, undiminished by reason of events involved in the taxpayer's acquisition of the moneys.

We see that subsidized vessel owners are not different from other taxpayers in this respect. Although it was initially suggested that the investment tax credit not be made available to them, no such limitation was extended by Congress. On the contrary, § 48(a)(2) expressly covers "any vessel documented under the laws of the United States." The legislative history indicates that transportation industries, regulated and unregulated, were to receive the credit. This court so held in *States Steamship Co.* v. *United States*, *supra* note 3. As was there pointed out (192 Ct. Cl. at 803, 428 F. 2d at 837):

> * * * it was the understanding of the conferees on the part of both the House and the Senate that the purpose of the credit was to encourage modernization and expansion of productive facilities in "both regulated and nonregulated industries." Moreover, it would be anomalous indeed to deprive a *subsidized* industry of the benefit of the credit, since that would work at cross-purposes to the subsidy, which is provided to allow the carrier to compete economically. [Emphasis in original.]

Defendant, in taking its position that only so much of the investment is qualified investment as did not have its source in tax deferred income on deposit in the reserve funds, relies to a great extent on Treas. Reg. § 1.48–1(b)(2) (1964), which reads as follows:

> (2) If, for the taxable year in which property is placed in service, a deduction for depreciation is allowable to the taxpayer only with respect to a part of such property, then only the proportionate part of the property with respect to which such deduction is allowable qualifies as section 38 property for the purpose of determining the amount of credit allowable under section 38. *Thus, for example, if property is used 80 percent of the time in a trade or business and is used 20 percent of the time for personal purposes, only 80 percent of the basis (or cost) of such property qualifies as section 38 property. Further, property does not qualify to the extent that a deduction*

for depreciation thereon is disallowed under section 274 (relating to disallowance of certain entertainment, etc., expenses). [Emphasis supplied.]

In the text of its argument in its brief, defendant recited only the first sentence of the above-quoted subparagraph (2) and left out entirely the portion we have emphasized. The first sentence would appear to apply to the situation at hand but we believe the portion emphasized by this court and significantly omitted by defendant places limitations on the first sentence. We do not think that the first sentence was meant to apply to the unique situation before us, particularly in light of the remainder of the regulation and for the other reasons as stated in this opinion. The emphasized portion clearly brings out the purpose of the regulation. It is a paraphrase of a statement that appears in both the House and Senate committee reports on the Revenue Act of 1962 which stipulated that investment credit should be proportionately reduced to the extent property is used for personal or entertainment purposes. If, for example, an automobile is used 80 per cent for business purposes and 20 per cent for pleasure purposes, the rule allows only the 80 per cent to qualify as section 38 property. The difficulty is that in the present case the ships purchased by plaintiff were to be and are used 100 per cent in its trade or business. The regulation has absolutely no application in a case like the present. Further, § 274, relating to disallowance of certain entertainment expenses, also has no application herein. It is significant that defendant does not point to nor can the court suppose another situation in which the first sentence could apply.

We, therefore, hold that the above-recited § 1.48–1(b)(2) has no application herein.

However, defendant argues that since the investment tax credit is computed on depreciable property, plaintiff does not get the credit based on cost basis because under the 1947 agreement a lesser basis is used to determine depreciation and it is on this cost less contributions from the reserve funds basis that the credit should be measured. This brings us to an examination of the closing agreement and the reason why the basis for determining depreciation is not cost but a lesser amount.

Defendant's primary position is that to the extent the vessels were acquired with tax-free reserve funds, they were not "section 38 property" because no depreciation was allowable thereon under the 1947 agreement. Defendant points to paragraph II of the agreement which states that money deposited in the reserve funds shall be "tax-deferred income" and to paragraph I(d) which provides that the "tax-deferred" funds are not to be recognized in the determination of cost basis. Since depreciation is allowed with respect to basis, and no depreciation may be claimed on the portion of the ships acquired with tax deferred funds, concomitantly, defendant contends that the investment credit does not extend to that portion of the vessel acquired with tax deferred funds. As a corollary, defendant argues that the term "cost basis," as used in the 1947 agreement, must have been meant to refer to "basis" as defined in § 1012.

Any consideration of the primary position presented by defendant necessarily requires this court to analyze the practical effect of the standard 1947 agreement, which other shipowners requesting subsidy entered into and which plaintiff entered into when it applied for subsidy.

It is our opinion that the fact that a portion of the cost of the ships is not depreciable because that cost has already been recovered through prior tax deferrals does not remove that portion from the investment tax credit provisions. When the parties entered the 1947 agreement, they did not anticipate the investment tax credit which came years later. They were providing a method for the recovery of a part of the cost of a vessel prior to its being purchased. In order to avoid a double deduction after the vessel had been purchased, depreciation was not allowed on that part of the cost already recovered. However, in reality, the cost to the plaintiff is what it paid for the vessels. The fact that the plaintiff was allowed to recover a portion of that cost prior to purchase by untaxed earnings and the remainder of the cost after purchase by depreciation is no different than if plaintiff were allowed accelerated depreciation in the early years of the vessel resulting in a deferral of taxes on part of its earnings to later years when its depreciation deduction would be lesser and, consequently, its income and its tax thereon would be greater.

The fact that accelerated depreciation was to be taken on a property would not affect its basis for the investment credit. We believe that plaintiff gets the equivalent of accelerated depreciation deductions in the years earnings escape taxation by being deposited in its reserve funds. The untaxed earnings are subtracted from basis; the 1947 agreement thereby adjusts basis to insure that depreciation deductions shall not be taken on elements of cost recovered through other means, *viz.*, the non-taxation of those elements when earned. Adjustments made to ensure that elements of cost are deducted only once are irrelevant to the purpose of the investment credit, *viz.*, to reduce the initial cost. We conclude that the agreement provides for an arrangement which we shall hereafter refer to as the "special depreciation arrangement." [11]

It is significant to this court that defendant does not in any portion of its briefs give its analysis of the special depreciation arrangement as plaintiff has done. We agree with plain-

[11] Plaintiff well illustrates the practical effect of the 1947 agreement by referring to the special depreciation arrangement as follows:

"* * * Thus (considering the income tax [effect] first) income and gains deposited in the reserves would not 'be recognized as taxable income' when earned; later, however, as the operating-differential subsidy agreement required, the reserves would be invested in new ships, and when so invested the portion allocated to tax deferred earnings would not 'be recognized in the determination of cost basis.'

"Since basis controls the computation of depreciation, future annual deductions for depreciation expense would thus be reduced by operation of the agreement. New ships would earn a larger taxable income than in the absence of the agreement, and over the life of the ships the government would recover the taxes that had been deferred when the deposited income was earned.[26] To illustrate, $100 of earnings deposited in the reserve funds would be untaxed when earned. But when invested in a new ship costing $1000 the untaxed $100 would reduce the basis for depreciation ('cost basis') of the new ship to $900. Over the 20-year life of the new ship the annual deduction for depreciation would be $45 rather than $50, the $5 difference would be taxable income, and in 20 years the government would have recovered the deferred taxes on $100.[27]

"Similarly, as basis controls gain or loss, on any sale of the future ship the agreement would, by reducing the basis, augment the taxable gains (or reduce losses) to the extent of the tax deferred income invested in the ship.

"[26] If over the 20 years the rates of taxation should rise, as in fact occurred, the government would tax the future income at higher rates, offsetting its deferral of the use of the tax money.

"[27] Accelerated depreciation produces a similar deferral of taxes. See, e.g., *Jones Bros. Bakery, Inc.* v. *United States*, 188 Ct. Cl. 226, 246–52 (1969). Large depreciation charges reduce taxable income in the early years of an asset's useful life; in the later years accelerated depreciation accounting produces smaller depreciation charges and higher income than straight line depreciation would have produced. The additional taxable income enables the government to recover the taxes deferred in the earlier years."

tiff that since the 1947 agreement was entered into many years prior to the enactment of the investment tax credit, the parties did not anticipate the tax credit. In this respect we refer to *States Steamship Co.* v. *United States*, *supra*. In *States Steamship Co.*, this court held that Maritime could not adopt regulations reducing the benefit of the investment tax credit to subsidized operators and that the plaintiff's agreement to accept Maritime's method of computing the subsidy did not constitute a waiver of benefits conferred by the subsequent investment credit. The court said (192 Ct. Cl. at 804, 428 F. 2d at 837):

> * * * It could not have been within the contemplation of either of the parties to bind themselves to any *future* changes in the tax laws, no matter how far-reaching or important. This is especially true where a whole new provision was inserted into the tax law in 1962 * * *. [Emphasis in original.]

Likewise, in the instant case plaintiff's agreement to accept the reduction in basis for depreciation, gain, and loss purposes did not constitute a waiver of benefits conferred by the subsequent investment tax credit. Plaintiff's 1947 agreement affects the basis of its ships only for the purposes of depreciation, gain, and loss involved in the tax deferral plan. The investment credit added a new use to the uses of the concept of basis. The basis provision in the 1947 agreement could not determine the basis of the ships for the investment tax credit because the enactment of the credit modified the assumptions of the parties as to the purposes for which basis was then relevant. Such a modification brings into play the saving clause in the 1947 agreement whereby the agreement is subject to changes in the law. The "WITNESSETH" clause of plaintiff's agreement provides:

> * * * any subsequent change or modification of applicable statutory law will render this agreement ineffective to the extent that it is dependent upon such law.

For purposes of the investment tax credit enactment, therefore, the basis provisions of the 1947 agreement are inoperative and basis or qualified investment for the calculation of the credit is to be determined under the investment tax pro-

visions without reference to those provisions of the agreement.

As defendant proposes, it is conceivable that the plaintiff could have purchased its vessels entirely with tax-free funds, in which case no portion of the cost would be recoverable through a method of depreciation. Applying defendant's premise, the plaintiff would not be entitled to the investment credit since the vessels would not be depreciable at all. This contention is tantamount to denying the investment credit to all subsidized shipowners which use only reserve funds to purchase vessels. It is unlikely that Congress intended such a result. As demonstrated hereinabove, the investment credit was a novel concept designed to stimulate the economy by reducing the cost of capital assets. Furthermore, the legislative record shows a clear and consistent Congressional intent that subsidized operators should obtain the full benefit of the investment credit. The 1947 agreement was shown to be unrelated in purpose to the investment credit. It established a special depreciation arrangement whereby deposits of taxpayer's earnings in its statutory reserve funds resulted in a change in the method by which plaintiff takes depreciation deductions on its vessels. We deem that Congress understood the effect of the investment tax credit on the 1947 agreement, that Congress foresaw the possibility that a shipowner could have purchased a vessel entirely out of its reserve funds, and that Congress intended that such a shipowner should still be entitled to the tax credit.

However, the defendant contends that there is no reference in the record to the subsidy agreement itself and, therefore, Congress had no notice of the special depreciation arrangement. It argues that these details were not shown in the record. We differ with the defendant because the 1947 agreement follows from the Maritime Act and that Act and the investment tax credit both deal with subsidized vessels. A new enactment on a subject is to be taken as intended to fit into the existing system and to be given a conforming effect unless a different purpose is plainly shown. *United States* v. *Arizona*, 295 U.S. 174, 191 (1935); *United States* v. *Jefferson Electric Manufacturing Co.*, 291 U.S. 386, 396 (1934); *Maul* v. *United States*, 274 U.S. 501, 508 (1927). Anyone dealing

with the Maritime Act, which entails operating and construction subsidies, should have had some general knowledge of how the Maritime Act operates with the reserve funds requirements. Ship replacement without these reserve funds was impossible. The special depreciation arrangement which we have discussed above was a necessary portion of the entire reserve funds structure. From the legislative record we deem that when the special provision with relation to documented vessels was put in the Revenue Act of 1962, Congress knew from the very mention of the word "subsidized" that subsidized ships were involved. This necessarily meant that the investment tax credit was intended to fit into the existing system which necessarily included the special depreciation arrangement. We deem it also relevant to note that when the investment tax credit was originally introduced, it did not include vessels used outside of the United States but that in the course of drafting the credit, Congress had before it, and rejected, the Treasury's view that the investment tax credit should not be made available to owners of vessels operating under an operating-differential agreement with Maritime. In fact, the decision to allow the credit on such vessels was explicitly criticized by the dissenting Congressional minority. As a result, we find that defendant's argument of no notice is unavailable.

Defendant alternatively contends that even if plaintiff could benefit by this court's decision that the 1947 agreement was not applicable to the investment tax credit, the plaintiff could only benefit from such a decision for 1962 and 1963. The rationale for defendant's contention is that modification of the 1947 agreement was accomplished by execution of a new agreement in 1964; and, as a result, the years beginning with 1964 would be controlled by the new agreement, which could not be construed in the same manner the 1947 agreement was construed, *viz.*, that the parties did not anticipate the investment tax credit. In answer to the defendant's argument, we deem it important again to note that the new agreement, as compared with the 1947 agreement, contained identical terms and conditions concerning the nonrecognition of tax deferred funds in the determination of cost basis, despite the fact that the new agreement was executed two years

after the enactment of the investment credit provisions. The 1964 agreement did not extend the scope of the 1947 agreement. Therefore, we find that the parties themselves have evidenced an understanding that the new closing agreement was not modified by the investment credit. In other words, the concept of cost basis as defined by the 1947 agreement carried over to the 1964 agreement and was unaffected by the investment credit provisions. In support of this holding, we deem it relevant to note that the IRS had not made its present position concerning the investment credit known to the plaintiff prior to the re-execution of the 1947 agreement in 1964. The first year in which the IRS made its position openly known was 1967; its position had not been announced in 1964 when the 1947 agreement was changed in the manner hereinabove described.

The first publication of the IRS position on the point is Rev. Rul. 67-395, 1967-2 Cum. Bull. 11. In that Ruling, the IRS addressed itself to the same situation as is presented here; however, no mention is made of the existence or terms of a closing agreement.

We recognize that the above-cited Revenue Ruling is the IRS general position on this matter; nevertheless, this court has stated that a ruling "may be helpful in interpreting a statute, but it is not binding on the Secretary or the courts. It does not have the effect of a regulation or a Treasury Decision." *Stubbs, Overbeck & Associates, Inc.* v. *United States*, 445 F. 2d 1142, 1147 (5th Cir. 1971); *Allstate Insurance Co.* v. *United States*, 209 Ct. Cl. 1, 11, 530 F. 2d 378, 384 (1976). The Court stated a similar proposition in *Biddle* v. *Commissioner*, 302 U.S. 573, 582 (1938): "* * * departmental rulings not promulgated by the Secretary are of little aid in interpreting a tax statute, *Helvering* v. *New York Trust Co.*, 292 U.S. 455, 467-468, * * *."

Also at issue is the effect on the investment tax credit of subsequent mortgage payments drawn from the reserve funds and allocated to tax deferred earnings. Since the tax deferred source of the funds used to originally acquire the ships here does not affect their bases for the investment credit, the identical result must follow where the funds are used to reduce the mortgages. Once the bases of the vessels are deter-

mined and the investment credit calculated, we hold that the tax deferred nature of the funds used to subsequently pay off the mortgages on the vessels is irrelevant. We recognize the IRS litigating position as stated in Rev. Rul. 68–468, 1968–2 Cum. Bull. 26; however, again we refer to *Allstate Insurance Co.* v. *United States*, *supra*, and *Biddle* v. *Commissioner*, *supra*.

One other point should be mentioned. It is not necessary to decide whether the reserve funds are tax-exempt or tax deferred since plaintiff prevails in that the closing agreement does not affect plaintiff's basis for the investment credit.

CONCLUSION

For the reasons above, defendant's motion for summary judgment is denied, plaintiff's motion for summary judgment is granted, and the amount of recovery is to be determined pursuant to Rule 131(c).

COWEN, *Chief Judge*, dissenting:

The provisions of the Merchant Marine Act, 46 U.S.C. § 1101, et seq. (hereafter MMA or "The Act"), as interpreted by the Maritime Administration, required shipowners to make deposits into the reserve funds to account for depreciation, not only for ships in existence but also for the future depreciation of ships yet to be built. The result was practically unique in that (1) depreciation was permitted and earnings were exempted from tax for ships which *had not yet been purchased;* and (2) depreciation deposits generally exceeded the depreciation allowed for tax purposes. In the absence of the closing agreements, the shipowners might well have claimed additional depreciation beyond that required by the Act, by deducting depreciation on newly purchased ships bought with tax-deferred funds. In effect, this would have permitted them to depreciate the cost of the ships once before purchase and once after.

The Closing Agreements of 1947 and 1954 sought to prevent this "double dip" by excluding the tax-deferred funds from the computation of the tax basis of the ships. This was not a "special depreciation agreement" as the majority main-

tains. Rather, it was a broad attempt to limit excessive depreciation deductions for any tax purpose. The Closing Agreement of 1954, provided as follows:

I. *Definitions:*

* * * * *

(d) "Tax-deferred" or "Tax-deferment" referring to ordinary income and capital gains deposited in Reserve Funds means that such items are not to be recognized as taxable income, except as provided in paragraph VI (c) hereof, and likewise are not to be recognized in the determination of cost basis or invested capital.

* * * * *

II. *Tax treatment of deposits in reserve funds:*

All earnings including capital gains, (not tax exempt under the Internal Revenue Code), which are deposited in the taxpayer's Reserve Funds, shall be Tax-deferred income; provided, however, that the taxpayer shall not be bound by this commitment beginning with the calendar year in which a decision of any court, sustaining the contention that Section 607(h) of the Act gives a tax exemption, instead of a Tax-deferment as herein provided, shall become final.

Article V of the same Agreement, entitled "Depreciation on Subsidized Vessels," provided in part as follows:

* * * Where, as the result of a portion of the price paid for vessels having been paid from funds not recognized as a part of basis for tax purposes, the amount of depreciation deposits required by the Maritime Administration exceeds the amount of depreciation so computed for tax purposes, such excess deposits shall be treated as required deposits of earnings, tax-deferred in character. * * *

These provisions, taken together, show that the parties intended that the entire amount of tax-deferred deposits would reduce the basis of the ships for all "tax purposes." There is no attempt to limit the nature or scope of the basis reduction, or to characterize the situation in any way as a "special depreciation arrangement" for a specific purpose.

The investment tax credit, as enacted in 1962 and reenacted in 1973, allows a tax credit of 7 percent of the taxpayer's *basis* on the article purchased. Int. Rev. Code § 46(c)(1)(A).

For newly acquired articles, the taxpayer's basis is *generally* the cost, as specified by Treasury Regulations § 1.46–3(c)(1). However, it is apparent that neither the Treasury Regulations nor the drafters of section 46 considered a situation by which a taxpayer's basis in property could be reduced even *before* the article was purchased, as occurred with the uniquely situated subsidized shipowners.

The reduction of the shipowners' basis before their purchase of the ships, while unusual, is nevertheless in keeping with principles evinced throughout the Internal Revenue Code. For example, section 167 requires reduction of basis to the extent of depreciation already taken, because the depreciation deduction reduces the tax cost of the article purchased.

Since the provisions of the MMA permitted the taxpayer to make deposits in a tax-deferred fund to account for future depreciation, it was reasonable that the parties would, in the Closing Agreements, agree to reduce their basis in the ships in accord with the tax deferment already received. What is not reasonable is that the majority would now restore the reduced basis of the ships to the level that existed before any depreciation had been taken. This result allows the taxpayer to compute the tax credit upon an artificially increased amount.

If it is permissible to restore a taxable basis previously reduced by agreement to the pre-existing level for purposes of computing the investment tax credit, it is logically permissible to restore that taxable basis for other purposes. For example, if the taxpayer derived capital gains from subsequent sales of its ships, it could argue that its cost basis in the ships should not be reduced by the allocable amount of reserve fund payments, but rather that the cost basis of the ships should be restored to the full amount of the cash purchase price.

The majority seeks to avoid such an untenable result by premising its holding in part upon "special reference" by Congress to subsidized industries in passing the investment tax credit. Yet the majority can find no special reference to subsidized shipowners in the legislative history and is forced to draw inferences from general statements regarding the

broad objectives of the tax credit. In contrast to the majority's inferences, it is my opinion that the legislative history indicates that Congress passed the credit without considering any possible effects upon the subsidized shipping industry. Statements appearing in the Senate Finance Committee Report on the Tax Reform Act of 1976 reinforce this conclusion. I recognize the general principle that subsequent Congressional reports on what Congress intended in enacting prior legislation, are to be accorded little weight, but I feel that the remarks of the Senate Finance Committee are too pertinent to escape note here. In its Report, the Committee states that:

> * * * since the tax provisions relating to the capital construction fund are in the Merchant Marine Act of 1936 rather than in the Internal Revenue Code, this question [of the effect of the shipowners' reduced basis upon the investment credit] was not reviewed when the investment credit was subsequently generally restored. *S. Rep. No.* 94–938, 94th Cong., 2d Sess., 196–97 (1976).

The only reasonable conclusion to be drawn from this statement is that the framers of the tax credit were completely unaware of the situation of the subsidized shipowners when provision was made for a tax credit to be computed upon a taxpayer's basis in acquired property. It may well be that if the question now before us had been presented to and considered by Congress when the investment credit was authorized, special provision would have been made to give the subsidized shipowners the credit claimed in this action. However, I find nothing in the applicable law or its legislative history which is sufficient to warrant judicial restoration of a taxable basis in property which has been reduced in accordance with the provisions of the MMA and the Closing Agreements of 1947 and 1954.

In summary,I would grant defendant's motion for partial summary judgment in so far as plaintiff's claim for investment credit includes a taxable basis which had previously been reduced by use of tax-deferred funds in purchasing the property, including both original payments and subsequent mortgage installments.

Dissenting Opinion by Judge Skelton

SKELTON, *Judge*, dissenting:

I cannot agree with the majority opinion because it allows the taxpayer a double deduction from its income tax of the money in the reserve fund used to buy the ships and to pay off mortgages on them.

The first deduction occurred when the money was deposited in the reserve fund. This was proper and in accordance with 46 U.S.C. § 1177(h) (1964) which provides that earnings deposited in the reserve funds "shall be exempt from all Federal taxes." This deduction was also in accordance with the tax closing agreements of 1947 and 1964, which provided that earnings deposited in the reserve funds would be "tax-deferred income," which was defined as meaning that such earnings were not taxed.

The second tax deduction occurred when the taxpayer included the payments from the tax exempt reserve funds in its cost basis in figuring its invested capital in the ships. This deduction was a direct and express violation and breach of the tax closing agreement of 1947 the taxpayer signed with the Internal Revenue Service. The majority holds that the Revenue Act of 1962 providing for the investment tax credit nullified the 1947 agreement. I do not agree. A new closing agreement was executed by the taxpayer and the IRS which, for all practical purposes, was the same as the 1947 agreement. These closing agreements provided that money deposited in the reserve funds "are not to be recognized in the determination of cost basis or invested capital." The taxpayer ignored this provision and included the previously deducted reserve fund money in its cost basis of the ships, thereby increasing its invested capital, resulting in an increased investment tax credit and a double tax deduction of the reserve funds.

Furthermore, the inclusion of the reserve funds in taxpayer's cost basis was in violation of Sections 38, 46 and 48 of the Internal Revenue Code of 1954 and Treasury Regulation § 1.48–1(b)(2) (1964), which allow an investment tax credit only on section 38 property, which is defined as "property with respect to which depreciation * * * is allowable." The above regulation provides that if a deduction for depreciation is allowable only on a part of taxpayer's property, then only that part qualifies as section 38 property for the purpose of

Syllabus

determining the investment tax credit. Here, that part of the ships paid for with reserve funds (down payment and mortgage payments) is not depreciable property because the amount thereof has already been deducted from taxpayer's income tax the same as if it was the value of fully depreciated property, and it cannot qualify as section 38 property for the purpose of determining the amount of investment tax credit.

I would allow defendant's motion for summary judgment, and deny that of the plaintiff and dismiss plaintiff's petition.

In accordance with the opinion of the court, a memorandum report of the trial judge, and a stipulation of the parties, it was ordered on March 11, 1977 that judgment be entered for plaintiff for the year 1964 for $264,108.32, plus interest thereon as provided by law.

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544 F.2d 493

PACIFIC TRANSPORT CO. AND SUBSIDIARIES v. THE UNITED STATES

[No. 209–72. Decided October 20, 1976]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT

Taxes; income tax; investment credit; operating-differential subsidy agreements; payments from tax-deferred income from reserve funds.—In this tax refund action, the facts in all significant points are substantially identical to those in *Pacific Far East Line* v. *United States*, ante at 71, involving the investment tax credit provisions of the Internal Revenue Code of 1954 Secs. 38 and 46–48. Since 1953 plaintiff or its predecessors have been contractors under operating-differential subsidy agreements, and have deposited in reserve funds pursuant to 46 U.S.C § 1177 (1964), a portion of their net earnings. Plaintiff's predecessor in 1953 entered into a closing agreement with the Commissioner of Internal Revenue which in 1957 was subsequently made applicable to plaintiff and to States Steamship Co., the operating company owned by plaintiff, and in 1964 a new closing agreement was entered into between States and the Commissioner identical to the 1953 agreement (with a nonrelative exception). The 1953 and 1964 agreements provided that all earnings deposited in plaintiff's reserve funds be tax-deferred in-

come, i.e. that they not be recognized as taxable income, and that they not be recognized in determination of cost basis or invested capital. The Service disallowed the investment credit claimed in 1962, 1963 and 1968 to the extent that plaintiff met its obligations with tax-free reserve funds, and this suit followed. For the reasons set forth in *Pacific Far East Line, supra*, it is *held* that plaintiff may receive investment credit for that portion of its costs of the vessels paid from tax-deferred reserve funds, and that the same rationale pertains to the payments from the reserve funds to reduce the mortgages on the vessels. Defendant's motion for partial summary judgment is denied and plaintiff's cross-motion is granted, the amount of recovery to be determined in further proceedings.

Taxes; income tax; credits against tax; investment credit in depreciable property.

[1] Plaintiff's qualified investment in its ships operating under operating-differential subsidy agreements for purposes of investment tax credit, is the cost of the ships to plaintiff whatever the source of the money, i.e. money from tax-deferred income on deposit in the reserve funds required by 46 U.S.C. § 1177 (1964). This also applies to use of the reserve funds to reduce mortgages on the ships.

Internal Revenue ⟸ 754

Valentine Brookes, attorney of record, for plaintiff. *Lawrence V. Brookes* and *Brookes, Brookes and Vogl*, of counsel.

Fenton P. Wilkinson, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. *Theodore D. Peyser* and *Robert S. Watkins*, of counsel.

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG, and BENNETT, *Judges*, *en banc*.

KASHIWA, *Judge*, delivered the opinion of the court:

This is a tax refund action involving the investment tax credit provisions of the Internal Revenue Code of 1954, § 38 and §§ 46–48.[1] The case is before the court on cross motions for partial summary judgment. For the reasons stated below, we hold for the plaintiff.

The facts in this case in all significant points are substantially identical to those in the case of *Pacific Far East Line*,

[1] All section references are to the Internal Revenue Code of 1954 unless otherwise noted.

Inc. v. *United States*, *ante* at 71, a companion case argued at the same time as the instant case.

Since 1953, plaintiff or its predecessor corporations have been contractors under operating-differential subsidy agreements with the United States Maritime Commission (now Maritime Administration) (hereafter Maritime) and have received subsidy payments from the United States Government for the operation of vessels in foreign commerce. A portion of the net earnings of plaintiff and its predecessor corporations has been deposited in reserve funds governed by § 607, Merchant Marine Act of 1936, as amended.

Plaintiff entered into construction contracts with Maritime and obtained construction-differential contracts under which the United States paid construction subsidies toward the cost of the vessels, to equate their cost with the cost which would have been incurred had they been constructed in foreign shipyards, and also to defray the cost of national defense features specified by the Navy Department.

In 1953, at the time that plaintiff's predecessor, Pacific Transport Lines, Inc., entered into the first subsidy operating agreement with Maritime, it entered into a closing agreement with the Commissioner of Internal Revenue (Commissioner). The agreement was made applicable by exchange of letters in 1957 to Pacific Transport Company, when that corporation was formed as the successor of the predecessor, Pacific Transport Lines, Inc. It was also made applicable to States Steamship Company, the operating company owned by Pacific Transport Company. In 1960 States Steamship Company, in anticipation of entering into construction contracts with Maritime, wrote the Commissioner requesting an amendment to the closing agreements to extend the depreciable life of the vessels from 20 years to 25 years, to accommodate the depreciation taken for tax purposes with that then recently adopted for computing net earnings for subsidy purposes. In 1964, in response to that letter request, a new closing agreement was entered into between States Steamship Company and the Commissioner, identical to the 1953 agreement except in the respect in which change was requested.

The 1953 closing agreement is similar in scope and effect to the closing agreements executed by all subsidized ship-

owners on an industry-wide basis in 1947. The closing agreement provides in pertinent part:

> All earnings * * * which are deposited in the taxpayer's Reserve Funds, shall be Tax-deferred income; provided, however, that the taxpayer shall not be bound by this commitment beginning with the calendar year in which a decision of any court, sustaining the contention that Section 607(h) of the Act gives a tax exemption, instead of a Tax-deferment as herein provided, shall become final.

and

> "Tax-deferred" or "Tax-deferment" referring to ordinary income and capital gains deposited in Reserve Funds means that such items are not to be recognized as taxable income, * * * and likewise are not to be recognized in the determination of cost basis or invested capital.

The 1964 closing agreement provided for the identical treatment of earnings deposited in the reserve funds.

Beginning in 1960 a series of ships was contracted for, and was constructed, and a portion of the cost was paid by plaintiff from the reserve funds which had not hitherto been subjected to federal income tax ($5,878,077.48), and a portion was paid from other funds of the plaintiff ($40,276,836.86). Some of the other funds were borrowed.

Plaintiff timely filed amended consolidated income tax returns for 1962 and 1963 on June 13, 1966, claiming an investment credit in an amount equal to 7 per cent of its total liability with respect to the six vessels placed in service in those years. Plaintiff also timely filed a consolidated income tax return for 1968 claiming an investment credit in an amount equal to 7 per cent of its total liability with respect to the vessel it placed in service in that year. Further, plaintiff timely filed consolidated income tax returns for the years 1964 through 1967 claiming the unused investment credit carried forward from 1962 and 1963.

Upon audit the Internal Revenue Service (IRS) disallowed the investment credit claimed in 1962, 1963, and 1968 to the extent that plaintiff met its obligations with tax-free reserve funds. The credit claimed for 1962 and 1963 was also dis-

allowed to the extent the vessels were constructed prior to January 1, 1962,[2] and also as a result of certain adjustments to the basis of vessels traded in on the new vessels. The latter adjustments had the effect of decreasing the basis of the old vessels, thereby increasing plaintiff's gain, which was non-recognized because deposited in reserve funds. These basis adjustments thus had the effect of increasing the amount of tax-free reserve funds excluded from plaintiff's qualified investment for investment credit purposes. With respect to the years 1964 through 1968, the investment credit claimed was disallowed to the extent the unused credit carried forward from 1962 and 1963 had been reduced. In addition, the IRS determined that the investment credit should be recaptured to the extent that the indebtedness incurred to purchase the vessels was satisfied with tax-free funds. Plaintiff paid the resulting tax deficiencies and filed amended claims for refund which were denied; and this suit followed.

Plaintiff's motion for partial summary judgment and defendant's cross motion for partial summary judgment deal with the issues of whether that portion of plaintiff's cost of the vessels paid from tax deferred reserve funds is properly includable in "qualified investment" for investment credit purposes and whether the investment credit should be recaptured to the extent such reserve funds were used to make subsequent mortgage payments on the vessels.

The issues involved here are the same as in *Pacific Far East Line, Inc.* v. *United States*, *supra*, and we refer the reader to our opinion in that case, published this same date. For the reasons stated therein, we hold for the plaintiff.

CONCLUSION

For the reasons above, defendant's motion for partial summary judgment is denied, plaintiff's motion for partial summary judgment is granted, and the amount of recovery is to be determined pursuant to Rule 131(c).

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[2] The issue of pre-1962 construction is not involved in plaintiff's motion for partial summary judgment or in defendant's cross motion for partial summary judgment. However, the identical issue was decided by this court in favor of the plaintiffs in *Lykes Bros. S. S. Co.* v. *United States*, 206 Ct. Cl. 354, 513 F. 2d 1342 (1975), and in *Pacific Far East Line, Inc.* v. *United States*, 206 Ct. Cl. 378, 513 F. 2d 1355 (1975).

COWEN, *Chief Judge*, dissenting:

I dissent in this case for the reasons stated in my dissenting opinion in *Pacific Far East Line, Inc.* v. *United States*, *ante* at 94, and I adopt my dissenting opinion as my dissent in this case.

SKELTON, *Judge*, dissenting:

I dissent in this case for the same reasons stated in my dissenting opinion in *Pacific Far East Line, Inc.* v. *United States*, *ante* at 98, and I refer to and adopt that dissenting opinion as my dissent in this case.

I would allow defendant's motion for summary judgment, and deny that of the plaintiff and dismiss plaintiff's petition.

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544 F.2d 496

DELTA STEAMSHIP LINES, INC. v. THE UNITED STATES

[No. 226–75. Decided October 20, 1976]

ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Taxes; income tax; investment credit; operating-differential subsidy agreement; payments from tax-deferred income from reserve funds.—Plaintiff, a contractor under an operating-differential subsidy agreement, acquired and placed in service during its short taxable year ended May 1, 1968 the *S.S. Delta Argentina* constructed under construction-differential subsidy provisions of the Merchant Marine Act. The investment tax credit arising from the acquisition could not be used in determining plaintiff's income tax liability for the short taxable year (because of limitations imposed by Sec. 46 (a)(2)), and said unusable credit became available as an investment credit carryback to plaintiff's taxable calendar years 1965, 1966, and 1967. Plaintiff was required under 46 U.S.C. § 1177 (1964) to *inter alia*, maintain a capital reserve fund to provide amounts necessary for ultimate replacement of its ships. Sec. 1177(b) provides that earnings so deposited in the reserve funds be exempt from Federal taxes. In 1967 plaintiff and the Treasury Department had entered into a closing agreement which compromised a dispute involving taxation of deposits in reserve funds during World War II by dividing the deposits into several categories and providing for distinct tax treatment of each. The Commissioner of Internal Reve-

nue, in disallowing part of plaintiff's claimed carryback, contends that the investment credit does not extend to that portion of the cost of the ship paid from the tax-deferred reserve funds. For the reasons set forth in *Pacific Far East Line* v. *United States*, *ante* at 71, it is *held* that plaintiff may receive the disputed investment credit as a carryback. Defendant's motion for partial summary judgment is denied and plaintiff's motion for summary judgment is granted, the amount of recovery to be determined in further proceedings.

Taxes; income tax; credits against tax; investment credit in depreciable property.

[1] That portion of the cost of the subject ship, operating under an operating-differential subsidy agreement, paid from plaintiff's reserve funds, deposits in which were not subject to tax, qualifies for the investment tax credit.

Internal Revenue ⇐⇒ 754

Daniel M. Gribbon, attorney of record, for plaintiff. *Harris Weinstein*, *David F. P. O'Connor*, and *Covington & Burling*, of counsel.

Fenton P. Wilkinson, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. *Theodore D. Peyser* and *Robert S. Watkins*, of counsel.

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG, and BENNETT, *Judges*, *en banc*.

KASHIWA, *Judge*, delivered the opinion of the court:

This is a tax refund action involving the investment tax credit provisions of the Internal Revenue Code of 1954, § 38 and §§ 46–48.[1] The case is before the court on plaintiff's motion for summary judgment and defendant's cross motion for partial summary judgment. For the reasons stated below, we hold for the plaintiff.

During its short taxable year ended May 1, 1968, plaintiff acquired and placed in service the SS *Delta Argentina*. This vessel is a type of business property to which the investment credit applies. By virtue of the limitations imposed by § 46(a)(2), none of the credit arising on plaintiff's acquisition of the SS *Delta Argentina* could be used in determining

[1] All section references are to the Internal Revenue Code of 1954 unless otherwise noted.

plaintiff's federal income tax liability for the short taxable year; and the part of the credit that could not be so used became available as an investment credit carryback to plaintiff's preceding taxable year, the calendar year 1967.

Plaintiff has been engaged in the business of common carriage by water in foreign commerce since its incorporation in 1919. Its vessels, which all bear United States registry, carry freight and mail in regular service between United States ports on the Gulf of Mexico and foreign ports in the Caribbean, South America, and West Africa.

During the years in issue § 607(b) of the Merchant Marine Act of 1936, 46 U.S.C. § 1177(b) (1964), required vessel owners, such as plaintiff, which received operating-differential subsidies,[2] to maintain a "capital reserve fund." Each year plaintiff was required to place in this reserve fund an amount equal to the depreciation, if earned, on all its ships in subsidized service, together with any profits realized from disposition of any ships and such other amounts as Maritime determined were necessary for the ultimate replacement of such vessels. For the duration of the contract term, the funds in this reserve could be used only to pay when due the principal of mortgages on subsidized vessels, to purchase additional vessels, to replace vessels in service, or to reconstruct vessels. Section 607(h) of the Merchant Marine Act of 1936, 46 U.S.C. § 1177(h) (1964), provides that earnings which are so "deposited in the contractor's reserve funds * * * shall be exempt from all Federal taxes."

The vessel here in question was constructed pursuant to the construction-differential subsidy provisions of the Merchant Marine Act of 1936, as amended, 46 U.S.C. §§ 1151 through 1161 (1964). Pursuant to these provisions, the Government pays such portion of the vessel's cost as equals the difference between the lowest bid on the vessel by a domestic shipyard

[2] Since December 31, 1937, plaintiff has been party to a succession of operating-differential subsidy contracts with the United States Maritime Commission (now Maritime Administration) (hereafter Maritime), entered into pursuant to §§ 601 through 613 of the Merchant Marine Act of 1936, as amended, 46 U.S.C. §§ 1171–1183 (1964). The contract covering the year here in question was executed on September 26, 1957, to cover a 20-year period, commencing on January 1, 1958, and extending through December 31, 1977. This is the same form of agreement as entered into by the plaintiff in *States S. S. Co.* v. *United States*, 192 Ct. Cl. 795, 428 F. 2d 832 (1970).

and the fair and reasonable estimate of the cost of constructing the vessel abroad. *Cf. Lykes Bros. Steamship Co.* v. *United States*, 206 Ct. Cl. 354, 513 F. 2d 1342 (1975). The investment credit in issue here relates only to the portion of the cost of the vessel paid by plaintiff.

To settle a dispute that involved the taxation of deposits made in reserve during World War II, when all vessels subject to operating-differential subsidy contracts were operated by and for the account of the United States, plaintiff executed a closing agreement on April 21, 1947, which was approved by the Treasury Department on July 16, 1947.[3] The closing agreement compromised the dispute by dividing the reserve deposits into several categories and by providing for distinct tax treatment of each. In this case the position of the Commissioner of Internal Revenue (Commissioner) rests on the part of the closing agreement that denominates all earnings deposited in reserves after the first subsidized voyage in 1946 as "tax-deferred." Such earnings were not subject to federal income tax when deposited in reserve, but they would "not * * * be recognized in the determination of cost basis or invested capital" so long as they remained in reserve or were applied toward the repair or purchase of a vessel. Since the closing agreement provided that the "[d]epreciation on vessels, to the extent based on cost shall be computed on the cost basis herein provided * * *," the depreciation deduction allowable to plaintiff is reduced to the extent that it purchases vessels with such "tax-deferred" funds. Concomitantly, the Commissioner contends that the investment credit does not extend to that portion of the vessel acquired with tax deferred funds because no depreciation is allowable thereon under the closing agreement.

On April 8, 1968, plaintiff acquired and placed in service the SS *Delta Argentina*. The total purchase price was $10,847,205.80. Of that sum, $5,705,535.18 was advanced by the Government under the construction-differential provisions of the Merchant Marine Act. Plaintiff paid the bal-

[3] All companies then subject to operating-differential contracts executed substantially similar closing agreements. Maritime has required all subsequent applicants for operating-differential subsidies to execute like agreements.

ance of $5,141,670.62, of which $1,874,158.44 was obtained from plaintiff's capital reserve fund.

On its federal income tax return for its short taxable year ended May 1, 1968, plaintiff claimed investment credit earned of $359,916.94, which amount is 7 per cent of the $5,141,670.62 that plaintiff provided in purchasing the vessel. Because limitations imposed by § 46(a)(2) precluded application of this credit against plaintiff's tax liability for this short taxable year, the entire sum became available for carryback and carryover in accordance with § 46(b)(1). In accordance with § 46(b)(1), plaintiff carried the unused investment credit back to each of its three preceding taxable years, the calendar years 1965, 1966, and 1967. Due to § 46(a)(2) and § 46(b)(2), plaintiff's carrybacks to 1965, 1966, and 1967 were limited to $150,161.24, $58,593.95, and $37,227.06, respectively. All of the carrybacks for 1965 and 1966 were allowed and accordingly are not in dispute.

On its federal income tax return for the calendar year 1967,[4] plaintiff claimed an investment credit in the amount of $39,675.66, consisting of $2,448.60 credit with respect to investments made during the calendar year 1967 (none of which are in dispute), and an investment credit carryback from its short taxable year ended May 1, 1968, of $37,227.06. The District Director of Internal Revenue, New Orleans, Louisiana, denied that part of plaintiff's claimed carryback which was based on plaintiff's application to its share of the purchase price of the $1,874,158.44 in reserve funds. This resulted in a disallowance of $26,729.60 of plaintiff's claimed carryback of $37,227.06 to 1967.

On June 14, 1974, plaintiff filed a timely claim for refund of federal income taxes for the calendar year 1967 in the aggregate amount of $26,729.60, plus interest, disputing, *inter alia*, the disallowance of investment credit as to that portion of plaintiff's cost of the vessel paid from its reserve funds. More than six months having passed without action on this claim, plaintiff timely filed its petition in this court

[4] Because plaintiff's 1967 return was filed on June 14, 1968, it was able to compute its investment credit carryback from its short taxable year ended May 1, 1968, and to include that sum in its 1967 return.

on July 3, 1975. Thereafter, on July 11, 1975, plaintiff's claim for refund was denied in full by a statutory notice of disallowance. The reason given was:

> It is determined that investment credit is available only on that part of the ship's cost which is used for depreciation purposes. Investment credit is not allowable on the cost of the ship which is from funds withdrawn from your tax deferred capital construction fund.[5]

The issue involved here is the same as the principal one in *Pacific Far East Line, Inc.* v. *United States*, *ante* at 71, a companion case argued at the same time as the instant caes. We refer the reader to our opinion in that case, published this same date. The issue is whether that portion of the cost of a ship paid from reserve funds, deposits in which were not subject to tax, is qualified for the investment tax credit.[6] For the reasons stated in *Pacific Far East Line, Inc.*, we hold for the plaintiff.

CONCLUSION

For the reasons above, defendant's motion for partial summary judgment is denied, plaintiff's motion for summary judgment is granted, and the amount of recovery is to be determined pursuant to Rule 131(c).

COWEN, *Chief Judge*, dissenting:

I dissent in this case for the reasons stated in my dissenting opinion in *Pacific Far East Line, Inc.* v. *United States*, *ante* at 94, and I adopt my dissenting opinions as my dissent in this case.

SKELTON, *Judge*, dissenting:

I dissent in this case for the same reasons stated in my dissenting opinion in *Pacific Far East Line, Inc.* v. *United*

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[5] This statement reflects the position taken by the Internal Revenue Service in Rev. Rul. 67–395, 1967–2 Cum. Bull. 11, and Rev. Rul. 68–468, 1968–2 Cum. Bull. 26.

[6] Since no mortgage payment is involved in the instant case, the other issue in the companion case involving mortgage payments is not applicable.

States, *ante*, at 98, and I refer to and adopt that dissenting opinion as my dissent in this case.

I would allow defendant's motion for summary judgment, and deny that of the plaintiff and dismiss plaintiff's petition.

In accordance with the opinion of the court, a memorandum report of the trial judge, and a stipulation of the parties, it was ordered on March 11, 1977 that judgment for plaintiff be entered for $26,729.60, together with interest as provided by law.

By order entered April 8, 1977 the order entered March 11, 1977 was amended by adding the following paragraph:

IT IS FURTHER ORDERED pursuant to the stipulation of the parties, filed March 7, 1977, that it is unnecessary to reach plaintiff's additional claim alleged in Paragraph 14 of the petition and such claim is dismissed without prejudice.

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544 F.2d 499

BUTKIN PRECISION MANUFACTURING CORPORATION v. THE UNITED STATES

[Nos. 641–71 & 484–73. Decided October 20, 1976. Plaintiff's sugestion for rehearing *en banc* and motion for rehearing denied January 7, 1977]

ON THE PROOFS

Renegotiation of contracts; redetermination of excessive profits; factors to be considered.—In these consolidated cases plaintiff seeks redetermination of the Board's determination that plaintiff realized excessive profits in its fiscal years ended July 31 of 1968 and 1969 in stated amounts. Plaintiff neither paid the Board's orders nor filed bond to stay execution thereon. On January 10, 1975 the court granted defendant's motion for judgment on its counterclaims. Plaintiff began as a small precision machine shop in 1954 and by the early 1960's its business consisted of commercial work and work for AVCO Corp. During 1965-67 with its own funds plaintiff increased its investment in plant facilities, machinery, equipment and tooling and during 1968 and 1969 nearly 100% of plaintiff's business was renegotiable work for AVCO under competitively bid, firm fixed-price contracts, and involved machining and assembling T-53 and T-55 aircraft engine parts for use during the Vietnam War. To maximize its production for AVCO plaintiff abandoned its com-

Syllabus

mercial customers. Defendant concedes that plaintiff is entitled to favorable consideration for the risk it assumed in expanding its business, its above-average contributions to the defense effort, its above-average efficiency, its effectiveness in controlling costs, and the complexity of the work performed. Plaintiff purchased its own materials and equipment, provided its own capital and subcontracted only a small portion of the work. To establish that plaintiff's profits were excessive, defendant relies through its expert on the incurred cost approach and the return on capital approach, using the period 1962–64 as an historical normal to measure plaintiff's profits in 1968–69, and compares plaintiff's performance with that of the aircraft parts industry generally, Plaintiff contends that the comparative data from the aircraft parts industry does not provide a valid basis for comparison, that defendant's use of 1962–64 as a base period is improper, and that defendant's analysis, when viewed against a properly defined base period, shows that excessive profits were not realized. It is *held* (1) that the comparative industry data relied on by defendant is unacceptable since it does not reveal how many, if any, machine shops were included; (2) that 1962–64 should be used as a starting point to determine the rate of permissible, nonexcessive profits with upward or downward adjustments as consideration under the statutory factors may require; (3) that by reason of plaintiff's efficiency, plaintiff should be allowed 50% of the savings realized by AVCO that resulted from dealing with Butkin rather than with other subcontractors; (4) that plaintiff's allowable profits merit substantial upward adjustment under the factor of reasonableness of costs and profits; (5) that in view of the capitalization of plaintiff's business and that its efficiency enabled it to do a large volume of war business in relation to its capitalization, to penalize it for relative low net worth would be to penalize it for efficiency; accordingly, the capital and net worth do not justify either raising or lowering the level of allowable profit as computed by application of other factors; (6) that in applying the risk factor a percentage of plaintiff's review years' profits should be reallocated to 1972 when it realized substantial losses because of curtailment in AVCO's war orders; this is in addition to the risk plaintiff assumed in expanding its business; (7) that there should be an allowance for plaintiff's contribution to defense, including it gratuitous assistance to other subcontractors, as detailed in the findings; and (8) in summary, the court concludes and determines as a matter of law that plaintiff realized no excessive profits from contracts or subcontracts subject to renegotiation during the review years. The court vacates its orders of January 10, 1975 entering judgment for defendant, enters judgment for plaintiff on defendant's counterclaims, and orders that plaintiff is entitled to a refund of all amounts paid to defendant, if any, together with interest as provided by the Renegotiation Act.

Syllabus

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; reasonableness of costs and profits; comparable industry.

[1] Where defendant's contention that plaintiff realized excessive profits during the review years was based on data comparing plaintiff's performance with that of a small fraction of a large group of companies running the gamut from manufacturers of dirigibles to guided missiles, and there was no way for the court to determine how many, if any, machine shops were included in the sample on which the data were based, such comparative data are little more than useless absent a standard by which to judge the results of the comparisons.

War and National Defense ⟸ 59

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; reasonableness of costs and profits; comparative base year.

[2] Although profits derived in the years relied on by defendant in the incurred cost approach as the norm to measure plaintiff's profits in the later review years which were derived from essentially a single high volume production activity, represent a composite of results from disparate activities of varying degree of profitability, since plaintiff was solely a precision machine shop in both periods and chiefly a subcontractor to the same defense-oriented contractor in both periods, the earlier base period profit should be used as a starting point to determine the rate of permissible, nonexcessive profit, with appropriate upward or downward adjustment as consideration under the statutory factors may require.

War and National Defense ⟸ 59

Evidence; hearsay; hearsay exception; regularly kept records.

[3] A finding based on reports by Government officials to the Renegotiation Board prepared in the regular course of their and its business is acceptable as within the intendment of Rules 801(d) and 803(8) of the Federal Rules of Evidence.

Federal Civil Procedure ⟸ 1191

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; efficiency of contractor.

[4] Although the evidence as to the efficiency of the prime contractor's other suppliers is inadequate as a comparison, where the quality and quantity of plaintiff's performance must be rated high, steady reduction in unit costs occurred in the review years, and the prime contractor and therefore the Government realized savings of 10% and 16.7% on plaintiff's sales to the prime in 1968 and 1969, respectively, it is reasonable to allow plaintiff a 50% share of these savings, although it fails to allow for benefits conferred by efficiency but not quantifiable in money, such as expedited deliveries.

War and National Defense ⟸ 59

Syllabus

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; reasonableness of costs and profits; accounting adjustments.

[5] Under 32 C.F.R. § 1460.10(b)(2) accounting adjustments cannot be made to offset deficient profits or losses in years not under review against review years, but under § 1460.10(b)(5) the court will give consideration in applying the statutory factors to deficient profits in earlier years where it can be established that deficient profits resulted from nonrecurring costs on renegotiable sales in the early stages of production which relate to production in the years under review.

War and National Defense ⇐ 59

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; risk of losses.

[6] Although plaintiff's pricing policy did not expose it to risk of loss, where plaintiff prior to the review years 1968–69 decided to sacrifice its commercial business in order to maximize production for the prime defense contractor, and in 1972 plaintiff experienced losses solely by reason of a sudden decline in the contractor's war orders, in determining what profit is reasonable for 1968–69, allowance for this risk is appropriate under 32 C.F.R. § 1460.12 by reallocating a percentage of the profits in 1968–69 to 1972.

War and National Defense ⇐ 59

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; contribution to defense effort.

[7] Creditable under the factor of contribution to the defense effort is the fact that plaintiff gratuitously assisted other qualified subcontractors to produce parts they could not produce for themselves.

War and National Defense ⇐ 59

Renegotiation of contracts; redetermination of excessive profits; factors to be considered; character of business.

[8] In general, the proper test under the character of business factor of 50 U.S.C. App. § 1213(e)(5) is value added, i.e. how much value did plaintiff add to the raw materials and services it purchased? The fact that the work was difficult, beyond the capacity of many machine shops, is not *per se* what Congress had in mind in enacting this factor.

War and National Defense ⇐ 59

Renegotiation of contracts; redetermination of excessive profits; evidence; burden of proof and persuasion.

[9] In *de novo* redetermination by this court of the amount of excessive profits, if any, realized by a Government contractor subject to the Renegotiation Act of 1951, as amended, the contractor has the burden of presenting first its *prima facie* case; however, such *prima facie* case does not have to be dismissed as insufficient solely because it does not include expert testimony even though it

would undoubtedly be helpful to the court. Thereafter, the burden shifts to defendant.

War and National Defense ⊂⊃ 59

Edward A. Lenz, attorney of record for plaintiff. *Numa L. Smith, Jr.*, *James W. Midgley*, and *Miller & Chevalier*, of counsel.

Gerald D. Freed, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before NICHOLS, KASHIWA and KUNZIG, *Judges*.

NICHOLS, *Judge*, delivered the opinion of the court:

This is a renegotiation proceeding in which plaintiff's profits for its fiscal years 1968 and 1969 are at issue. The Renegotiation Board determined that plaintiff had realized excessive profits in the amount of $350,000 in its fiscal year ended July 31, 1968, and $325,000 in the following 1969 year. The record does not include any statement of the Board's reasons. This action was commenced as to fiscal year 1968 by a petition, in the United States Tax Court. Thereafter, on July 27, 1971, it was transferred pursuant to Pub. L. No. 92–41, § 3, 85 Stat. 97 (1971). A similar action was filed in this court seeking a *de novo* redetermination of the Renegotiation Board's finding concerning fiscal year 1969 (Ct. Cl. No. 484–73). The two cases were consolidated for trial. In this *de novo* proceeding, defendant asks the court for a redetermination that plaintiff's profits for fiscal year 1968 and fiscal year 1969 were excessive in a total amount of not less than $986,000, almost 50% over the Board figure, and judgment in favor of the United States in an equal amount, plus interest as provided for in § 105(b)(2) of the Renegotiation Act of 1951, as amended, (hereinafter cited as Act) 50 U.S.C. App. § 1215(b)(2). Plaintiff did not either pay the Board orders for the years in issue or file a bond to stay execution on the orders. On January 10, 1975, the court granted defendant's motion for judgment on its counterclaims, but this does not pretermit our redetermination as we now announce it. We are indebted to former Trial Judge Hal D. Cooper's able recommended opinion, proposing a determination of no excessive profits. We agree, but on other grounds.

I.

Plaintiff began as a small precision machine shop in 1954 when the plaintiff's president, and sole owner, John Butka, started producing parts with a few used machines in his mother's basement. In the next few years the business grew gradually as Mr. Butka's skill and ingenuity became known. In the late 1950's it began producing prototype parts for the T–53 and T–55 gas turbine engines being developed by the experimental department of the Lycoming Division of AVCO Corporation. These engines were subsequently used in various military helicopters during the Vietnam War.

By the early 1960's plaintiff's business was a mix of commercial work, low volume prototype work for AVCO and relatively high volume production of T–53 and T–55 engine parts for AVCO. In the mid-1960's, plaintiff decided to concentrate on production of engine parts for AVCO. As the American buildup in Vietnam continued during the plaintiff's fiscal years 1965 through 1967, the plaintiff correspondingly increased its investment in machinery, equipment, and tooling, and devoted a major portion of its time and effort to engineering and development relating to the T–53 and T–55 engine program and AVCO's increasing need for parts for those engines. The plaintiff grew from 34 employees in 1962 to 88 in 1967 and 1968, reaching 115 during 1969. Its plant and facilities were expanded as well.

Its sales peaked in 1968 and 1969 when the demand for parts for the T–53 and T–55 engines reached its peak. By that time nearly 100 percent of the plaintiff's business was renegotiable work with AVCO, and largely represented production of T–53 and T–55 aircraft engine parts. This involved working unusual and difficult metals such as titanium, to tolerances as low as 1/10,000 of an inch.

On renegotiable sales of $2,290,821 in 1968, plaintiff realized profits of $714,818, a rate of 31.2 percent, and on renegotiable sales of $2,823,448 in 1969, plaintiff made a profit of $787,075, a rate of 27.8 percent of renegotiable sales. Plaintiff proposed some adjustment to those figures but we adhere to them for reason to be stated. In 1970, as demand for the T–53 and T–55 engines declined, plaintiff's profits plummeted to 1.6 percent

of sales. In 1971 and 1972 it sustained losses of 31 percent and 13 percent on sales, respectively.

Plaintiff has established that almost all of its work with AVCO in 1968 and 1969 was on a firm fixed price basis and that its contracts were awarded on the basis of competitive bidding. It was one of the top 25 or 30 suppliers of precision engine parts to AVCO. Its prices in fiscal 1968 and fiscal 1969 averaged approximately 11 percent lower than its prices during fiscal 1967. AVCO computed plaintiff's prices to be, on the average, 10 percent lower than the next higher bidder in fiscal 1968, and 16.7 percent lower than the next higher bidder in fiscal 1969. The record amply demonstrates that, during the period of peak demand in 1968 and 1969, plaintiff responded by consistently producing a wide variety of engine parts in less time, at lower prices and with higher quality than any of its competitors. In large part, this was the result of plaintiff's gamble in earlier years when it expended sums in tooling (findings 9, 10), its superior technical ability and know-how and plain hard work.

Defendant concedes that plaintiff is entitled to favorable consideration for the risk plaintiff assumed in expanding, with its own funds, its productive facilities over the years, for its above-average contributions to the defense effort, for its above-average efficiency, for its effectiveness in controlling costs, and for the complexity of the work it performed. In addition to these statutory considerations, 50 U.S.C. App. § 1213(e)(1)–(6), plaintiff has also shown that it purchased its own materials and equipment (*i.e.*, it did not use Government-furnished materials or equipment), that it provided its own capital, and that it subcontracted only a small portion of the work.

II.

Against this impressive record of achievement by a small enterprise, defendant through its expert, Professor E. J. B. Lewis, relies on two analytical approaches, together with comparative industry data, in support of its burden, *Lykes Bros. S. S.* v. *United States*, 198 Ct. Cl. 312, 459 F. 2d 1393 (1972), of establishing that plaintiff's profits were excessive. Both analyses proceed from the premise that the period 1962–1964 represents, in plaintiff's corporate history,

an historical norm against which its profits in the review years are to be measured. The analysis on which defendant principally relies is the incurred cost approach in which an average profit as a percentage of incurred costs is computed for the years 1962–1964 (in this case it is 7.089 percent), and applied to the dollar amount of incurred costs in the review years to establish a permissible profit for the review year. The other analysis is the return on capital approach in which the average percentage return on capital in the base years is computed (in this case 22.162 percent), and applied to the capital employed for renegotiable business in the review year to arrive at a profit figure.

Defendant's two analyses yield the following results:

Incurred Cost Approach	*FY 1968*	*FY 1969*
Incurred costs	$1,612,817	$2,053,764
Normal profit (7.089% of costs)	114,333	145,591
Return on Capital Approach		
Capital employed	551,250	730,136
Normal profit (22.162% of capital)	122,168	161,813

Defendant excludes from the capital employed certain sums carried on the books as loans to Mr. Butka, the sole owner of the company.

In recognition of plaintiff's entitlement to favorable consideration under the statutory factors, defendant proposes to credit plaintiff with what it denominates a 20 percent risk bonus and a 50 percent profit bonus. The following computation incorporates these bonuses and demonstrates how defendant arrives at its conclusion that profits are excessive:

Incurred Cost Approach	*FY 1968*	*FY 1969*
Normal profit	$114,333	$145,591
50% profit bonus	57,167	72,795
20% risk bonus	57,805	68,541
Total profit	229,305	286,927
Renegotiable profits	714,249	784,531
Excessive profits	490,096	499,678
Return-On-Capital		
Normal profit	122,168	161,813
50% profit bonus	61,084	80,906
20% risk bonus	43,985	50,936
Total profit	227,237	293,655
Renegotiable profits	714,249	784,531
Excessive profits	492,118	492,999

Defendant contends that corroboration for the conclusion that plaintiff realized excessive profits during the review years is to be found in a comparison of plaintiff's performance with that of the aircraft parts industry generally. Based on data from STATISTICS OF INCOME, CORPORATION INCOME TAX RETURNS, a comparison of return on capital employed reveals:

FY 1968 Return on Capital	*Percent*
Butkin	132.5
Aircraft Parts Industry	12.8
FY 1969 Return on Capital	
Butkin	108.2
Aircraft Parts Industry	5.3

A comparison of return on net worth is as follows:

FY 1968 Return on Net Worth	*Percent*
Butkin	612.70
Aircraft Parts Industry	32.75
FY 1969 Return on Net Worth	
Butkin	304.30
Aircraft Parts Industry	12.10

In rebuttal to defendant's presentation, plaintiff contends that the comparative data from the aircraft parts industry does not provide a valid basis for comparison; that defendant's use of the years 1962–1964 as a base period is improper, and that defendant's own analysis, when viewed against a properly defined base period, shows that excessive profits were not realized.

Considering first the validity of the comparative data on which defendant relies, it appears that the data was drawn from only a small fraction of a very large group of companies that run the gamut from manufacturers of dirigibles to guided missiles, from cowl flaps to rocket motors. There is no way of determining how many, if any, machine shops were included in the sample on which the data is based, or whether any of the machine shops, assuming some were included, were of the kind doing precision work. Further, virtually all of the data in the SOURCE BOOK on which defendant relies is marked with an asterisk, the Internal Revenue Service having used that symbol to indicate that there is a high sampling variability and that the data should be used with caution. Under these circumstances, comparison of this data with

plaintiff's performance can only be, as defendant's expert described it, superficial at best.

Of course, merely because comparative data has some weaknesses is no reason to ignore it entirely. However, it is little more than useless in this case because the court has been provided with no standard by which to judge the results of the comparison. Defendant is contending for a result here which would leave plaintiff, according to defendant's calculations, with an after-redetermination return on net worth of almost 200 percent. Defendant offers no suggestion, no guidance, no clue by which one could divine how it is that a return of that magnitude is reasonable, when compared to an industry average of 30 percent, but a return of 300 percent, or 400 percent, or more, is indicative of excessive profits when compared with the same industry average. That these comparisons are of little significance is confirmed by the testimony of defendant's expert who stated that return on net worth and on capital were, in his opinion, "neutral factors" in this case. Defendant really and rightly abandoned reliance on capital and net worth as relevant factors when it allowed plaintiff even as much profit as it did. The statute does not prescribe their use to maintain a ceiling on allowable profits in all cases.

With respect to defendant's reliance on a base period of 1962–64 as being representative of an appropriate historic norm, Trial Judge Cooper also saw serious defects. The facts are that a substantially higher volume of commercial work was done in those years than in the review years; that much more low volume, pre-production and prototype work was performed in those years than in the review years; that only about one-half of the work in those years was the kind of production work performed in the review years; that in 1968 plaintiff performed a substantial amount of salvage work for AVCO which was a unique situation not found in the base years; that, due to the low volume prototype work, the expensed tooling costs as a percentage of sales were much higher in the base years than in the review years; that for the same reason the direct labor costs as a percentage of sales were much higher in the base years than in the review years. On these facts, he found it difficult to accept defendant's premise

that the entirety of plaintiff's business in 1962–64 should be viewed as a norm against which its high volume production activities in 1968 and 1969 are to be measured. Not only do the review years differ from the base years in volume of activity but also in the character of the activity. Thus, the profits derived in 1962–64 represent a composite of results from disparate activities of varying degrees of profitability while those in the review years were derived from essentially a single activity.

He said that a better comparison under defendant's incurred cost approach would be to determine the profit realized in 1962–64 from operations that were the same or similar to those in 1968 and 1969, *viz.*, production-type operations, and use that profit, computed as a percentage of the costs incurred, to determine whether excessive profits were made. Similarly, in computing return on capital, a better comparison would seem to be one based on plaintiff's earnings from production operations and only those assets employed in that production work both in 1962–64 and in the review years. That comparisons based on the same or similar operations are the more relevant is also confirmed by Renegotiation Board Regulation (RBR) § 1460.2 (c), 32 C.F.R. § 1460.2 (c) (1974):

> *Comparisons.* In evaluating the contractor's performance, comparisons will be made with the prices, costs and profits of other contractors engaged in the production of the same or similar processes.

(Also, see RBR § 1460.10(b)(2). Board Regulations are published in 32 C.F.R., Chapter XIV, Subch. B. They are cited hereinafter by reference only to the Board's section breakdown. As to the effect of such regulations upon proceedings in this court, see fn. 13 in *Mason & Hanger-Silas Mason Co.* v. *United States*, 207 Ct. Cl. 106, 518 F. 2d 1341 (1975). Neither party has challenged any of them in this case.)

A comparison of results from production work in 1962–64 with plaintiff's performance in the review years revealed to Judge Cooper a much different picture than that painted by defendant. Plaintiff has shown that, on a sampling of 25 production orders in 1962–64, selected by defendant, it was realizing a profit of approximately 27 percent of sales. That figure

compares favorably with plaintiff's profit on sales of 31 percent in 1968 and 27 percent in 1969, particularly when plaintiff is credited for the greater risk and its higher efficiency in those latter years. This comparison would strongly suggest that, if the base period's profits were reasonable, then so also were those in 1968 and 1969.

Plaintiff's profit on that work, expressed as a percentage of incurred costs, was 36 percent, a figure drastically different from the 7.089 percent figure calculated by defendant based on plaintiff's entire mix of business. By using 36 percent in defendant's incurred cost analysis, and crediting plaintiff with the 50 percent and 20 percent bonuses advocated by defendant's expert, it appeared that plaintiff's reasonable profits for 1968 and 1969 would have been $928,726 and $1,177,573, respectively. Its actual profits were, of course, well below those figures.

While we appreciate the force of these arguments, the fact still remains that plaintiff was solely a precision machine shop both in 1962–64 and in 1968–69, and chiefly a subcontractor to AVCO in both periods. The change was essentially from low volume to high volume orders for similar items, as AVCO shifted from a peacetime to a wartime production rate, and as civilian customers of Butkin were dropped. That the high volume orders were more profitable to fill, than low volume orders, is precisely the situation Renegotiation was invented to deal with. Experience in several wars has shown the tendency for unit prices not to decline as fast as the volume increase would justify. The Regulation, RBR § 1460.10 (b) (2), allows consideration of profits even on non-renegotiable products, where similar, for comparative purposes. Here, however, the 1962–64 profits were non-renegotiable only because of the $1,000,000 floor. Act, § 1215(f) (1), as amended. Every renegotiation needs a "starting point" somewhere, if a determination is to be informed and reasoned. Base period profits are often the best "starting point" available. A wooden adherence to the average base period profit rate of 7.09 percent here would shock the conscience, but defendant has never contended for that. We agree with defendant that it should be used as a "starting point" to determine a rate of permissible, non-excessive profit, with appropriate upward or down-

ward adjustment as consideration under the statutory factors may require. We differ with defendant as to the amount of upward adjustment necessary. In this case, defendant has suggested no downward adjustment, nor do we.

III.

The first factor we consider is "Efficiency". Defendant would allow $57,167 as a bonus for "Efficiency", lumped with "cost control" and "contribution" to the defense effort, for 1968, and $72,795 for 1969. These figures are inadequate for "Efficiency" alone. Quality and quantity must be rated high, and a steady reduction in unit costs occurred in the review years. The trial judge found that plaintiff lowered its 1967 price about 11 percent and that AVCO computed its prices as averaging 10 percent below the next higher bidder in 1968 and 16.7 percent in 1969, (Finding 17). Congress lays special weight on efficiency, saying it must be given "Favorable recognition." Act, § 1213(e). It is easy to see that a wooden adherence to a preconceived profit rate, such as the 7.09 percent rate here, would penalize efficiency. It is easier to conceive that a rate exists that would tip the scale and make efficiency more profitable, even after renegotiation, than inefficiency. It is harder to determine what the rate should be in face of the thin record we have here.

Defendant complains that Finding 17 is based on hearsay evidence, to which it made timely objection. It appears to be based on reports by Government officials to the Renegotiation Board, in the regular course of their and its business. See, Pub. L. 93–595, 88 Stat. 1926, Rules 801(d)(2) and 803(8). We must presume the trial judge found that the circumstances warranted use of this material. A more detailed comparison of plaintiff's operation with that of other suppliers (and in no instance or virtually none was plaintiff a sole source) would be of inestimable value, and we find it strange that defendant did not supply it, in view of the time FBI agents spent preparing the case, not counting overtime, 206 agent days, according to Mr. Lewis. (Tr. 384). If we assume AVCO knew as much about its other suppliers as it did about plaintiff, as the evidence shows, the agents need have gone no further. We do not think that defendant, who had the

burden of proof, is in a position to complain about the thinness of the comparison evidence. That evidence enables us to suppose that AVCO, and therefore the Government, saved 10 percent on plaintiff's sales to AVCO in 1968, or $229,082, because it had the efficient Butkin to deal with, in addition to others, and by the same reasoning it saved 16.7 percent on plaintiff's sales to AVCO in 1969, or $471,515. See Findings 5 and 17. It would seem reasonable that a 50 percent share of these savings would no more than suffice to make efficiency more profitable than inefficiency. We have not been given the means for any but the roughest calculation, and ours is probably on the low side because it fails to allow anything for benefits conferred by efficiency but not quantifiable in money, such as expedited deliveries.

IV.

We turn now to the factor, "Reasonableness of Cost and Profits", Act, § 1213(e)(1), and RBR § 1460.10. It is evident that plaintiff kept its apparent costs high in the base period, and through its fiscal 1967, and its profits correspondingly low, by expensing the costs of assets that were of a durable nature and were used in production in the review years. This boomeranged when the costs of 1968–69 were low and the profits high, at least in a forensic sense. The most notable example of this is the tooling. See Findings 10 and 25(a). In 1965 tooling expense reached the astounding total of 60 percent of sales, declining only to 52 percent in 1966 and 40 percent in 1967. Much of this was "hard" tooling that, contrary to the usual machine shop practice, plaintiff made sufficiently durable to be used in anticipated follow-up orders as well as the order for which it was made. Defendant says the table in Finding 10 includes "soft" as well as "hard" tooling, but, to the extent this is so, it only accentuates the misfit between the years in which the cost of "hard" tooling was expensed and the years in which the same tooling generated production. A transfer of $500,000 of tooling expense to 1968–69 would make the allocation more proportionate. According to RBR § 1460.10(b)(2), accounting adjustment cannot be made to offset deficient profits or losses in years not under review, against years that are, but by RBR § 1460.10(b)(5) the

Board will give factor consideration to deficient profits in earlier years in some situations, *e.g.*:

> * * * Where it can be established that deficient profits * * * resulted from nonrecurring costs on renegotiable sales in the early stages of production which relate to production in the year under review, the Board will take this into account in reviewing the contractor's renegotiable business in the year under review * * *

It goes on to refer to cost of "special tooling" in the earlier period as an example of the cost misallocation it has in mind.

Plaintiff's process sheets also were assets of substantial value that were expensed in prior years but contributed largely to production in the years under review. Finding 20. No basis is given for an estimate of the cost of these sheets nor the amount, if any, of the financial adjustment that might be made. It is evident that, to some unknown extent, the process sheets made the profits misleadingly low in years before 1968–69, and misleadingly high in those years.

Butkin proposed four accounting adjustments that are apparently germane under this factor which would:

> *First.* Increase depreciation of machinery to reflect multiple shifts worked in the period under review.
>
> *Second.* Include the full cost of "special purpose" machines no longer required after loss of war business.
>
> *Third.* Defer until the review period a part of the salaries of Mr. Butka and three key subordinates paid in earlier periods, and the overhead allocable to them.
>
> *Fourth.* Charge an additional write-off of the undepreciated cost of equipment placed in storage in the summer of 1969 because no longer needed.

Defendant's expert rejected these adjustments as accounting adjustments, and we agree. He allowed three of them factor consideration and the "risk" bonuses he proposed, of $57,805 for 1968 and $68,541 for 1969, approximated the amount of adjustment he would consider appropriate for them. It would appear, however, that the proper factor to consider them under is "reasonableness of costs and profits". He rejected the salary adjustment for any purpose, we suppose rightly. Therefore, we deem defendant to have conceded factor adjustments for the reasons indicated, in the amounts stated, and there is no evidence that they are insufficient.

Thus plaintiff's allowable profits merit substantial upward adjustment under the factor "reasonableness of costs and profits", as indicated, the so-called "risk" bonus of defendant's expert being but a part of the necessary revision.

V.

The next statutory factor is § 1213(e)(2):

> The net worth, with particular regard to the amount and source of public and private capital employed;

Unlike many small contractors, the plaintiff was not financed by its customers at all, not even by progress payments, though its billings were always promptly paid. There were no Government or Government-guaranteed loans. There was a modest amount of short-term bank debt up through 1968, but even that disappeared in 1969. Plaintiff essentially financed the necessary plant expansion with its own earnings. It would appear to have been over capitalized to the extent it was able also to loan substantial sums to Mr. Butka, its sole owner, for his personal purposes. It leased its plant facilities from Mr. Butka. (Tr. 64). This use of leased facilities the Renegotiation Board has recognized to make net worth misleading or irrelevant as a guide to an allowable level of excessive profits. Hearings, Subcommittee on Appropriations, U.S. Senate, on H.R. 15572 (1975) 461–63. It would appear that to construct meaningful capitalization figures for factor analysis purposes, it would have been necessary to consolidate the assets and liabilities, employed or incurred in the business, by the plaintiff corporation and by Mr. Butka personally. Mr. Lewis, the defendant's expert, did not perform such a consolidation, nor did he display any belief that the capital and net worth were really meaningful as he computed them. It is, therefore, not clear why he used capital and net worth computations as an alternative basis for the determination he proposed. The expensing of important assets used in production is another reason why the involved figures are misleading. Furthermore, net worth would not be considered relevant to a purely personal service business, and yet here, the contribution by Mr. Butka's know-how was concededly so great that the corporate business of Butkin must be deemed at least

partially of that character. It is not necessary to try to capitalize the contents of Mr. Butka's brain, to see they were an asset. Mr. Lewis noted that plaintiff's efficiency enabled it to do a large volume of war business in relation to its capitalization. In view of this, to penalize it for relative low net worth would be to penalize it for efficiency. A hypothetical less efficient company, requiring more fixed assets for the same production, would be unreasonably favored.

We have, therefore, considered the capital and net worth as the statute requires us to, but do not deem that they justify either raising or lowering the level of allowable profit, as computed by application of other factors.

VI.

The next factor is Act, § 1213(e)(3):

> Extent of risk assumed, including the risk incident to reasonable pricing policies;

We agree with Mr. Lewis that plaintiff's pricing policy did not expose it to risk. However, we do not agree in his rejection of plaintiff's 1971 losses as realization of risk incurred as a result of plaintiff's conscious decision, made before the years under review, to abandon all other business in order to maximize production for AVCO. (Tr. 518). It was always obvious that the nature of plaintiff's relationship to AVCO provided no safety in case of a sudden decline in AVCO's war orders. This occurred and had the financial effects on plaintiff shown in Finding 6. In retrospect Mr. Butka considered the dropping of Xerox and IBM "a bad mistake on my part" (Tr. 78). Mr. Lewis seemed to imagine that the decision was not creditable under the risk factor because it was made to maximize profits. Assuming this to be true, though there is no direct evidence for it, the risk factor was not designed to reward altruistic contractors only. It was based on the well known fact that persons who invest in a risky enterprise can command more return than those who invest in enterprises free from risk.

The Board says in RBR § 1460.12(b)(1):

> * * * In some cases a substantial degree of risk will be found in the temporary sacrifice of civilian markets

> to competitors, in order to accept more defense orders, * * * The Board will give special consideration to evidence showing risks through actual realization of losses incurred by the contractor in performing contracts in other years similar to the contracts undergoing renegotiation * * *

This, like efficiency, is a factor that requires overriding recognition. In *A. C. Ball Co.* v. *United States*, 209 Ct. Cl. 223, 230, 531 F. 2d 993, 996 (1976), the court explains the Congressional mandate, as it appears to be, and points out that even under the same regulation language as quoted above, Congress was not satisfied with the then ongoing application of the risk factor to actually realized losses. A large, diversified concern can offset any losses against current profits. The risk factor is often the sole protection of the small business concern against a tunnel-visioned application of the fiscal year method of renegotiation to its profitable years only.

The profit of $31,340 shown for 1970, though only 1.6 percent of sales, can be disregarded as not being an actual loss and therefore not within the literal language of the regulation. As to 1971, a loss of $277,091 is shown, 31 percent of sales. AVCO was still the customer in 46 percent of this business.

Assume that $313,091 were added to 1971 receipts, with no change in cost, this would allow $36,000 in 1971 profit, within the range of the base years 1962–64 profits. Therefore, hypothetically, for factor analysis purposes, (and not as an accounting adjustment) in determining what profit is reasonable for 1968–69, $313,091 should be taken off those years' profits and reallocated to 1971. Arguably, a further sum should be reallocated for 1972. This we believe is what the Board undertook to do in the regulation quoted above. The defendant has not shown that plaintiff's 1971 and 1972 losses had any cause except realization of the risk that AVCO might lose its war contracts.

Since defendant made no allowance for this risk, and its so-called "risk bonus" is employed for other purposes, properly under another factor, the whole allowance we will make under the risk factor must be additional to defendant's adjustments.

VII.

The next factor under Act, § 1213(e)(4) is:

> Nature and extent of contribution to the defense effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance;

Plaintiff claims credit under this factor for supplying without compensation, at AVCO's request, technical assistance to other subcontractors to AVCO, enabling them to produce the parts plaintiff produced, or some of them, which otherwise they could not have done, though they were highly skilled machine shops and among AVCO's top 25 vendors. Finding 21. (See Tr. 83, 120 and ff.). Mr. Butka's testimony is specific and is not contradicted. The record does not enable a money value to be placed on this.

Finding 18 describes the program plaintiff undertook to rework 1,150 pieces of a part, which AVCO had spoiled in its own in-house operation. Plaintiff saved 952 such parts, at a price of $272,830. AVCO would have had to pay plaintiff $480 for each part new, or would have incurred cost of $625 per unit, making them in-house. Plaintiff saved AVCO and in turn the Government, between $184,130 and $322,170. In renegotiation, plaintiff might be rewarded with one-half the saving; however, the contract price should be deducted from the sales figure used in computing the reward for "efficiency". Say the credit should be $250,000 for the two years combined.

Findings 22 and 23 detail other creditable contributions. Defendant credits plaintiff with above average contributions, but its profit allowance or "bonus" lumped with that for efficiency and cost control, is inadequate for efficiency alone and thus we deem defendant has allowed nothing for contribution.

VIII.

The next factor, and the last except for the unused one (RBR § 1460.15) is Act, § 1213(e)(5):

> Character of business, including source and nature of materials, complexity of manufacturing technique, character and extent of subcontracting, and rate of turnover;

The regulation, RBR § 1460.14 spells out that relative complexity and degree of integration are the dominant considerations here. The findings do not address this as directly as could be wished. In general, the proper test is value added. How much value did plaintiff add to the raw materials and services it purchased? For example, an assembler who merely put together complex parts and sub-assemblies purchased from others, *e.g.*, one who put watch movements into watch cases, would not fare well under this factor. A number of clues in the record suggest that the value added was high, but this cannot be said to be well established and in particular, no material for comparison is available. Our ignorance as to what value added comparisons would show, is the main reason why the statistical data defendant has offered, as to earnings, capital, and net worth, in companies supposedly in the same line of work, is here meaningless. Defendant offers no basis for unfavorable evaluation at any rate. Plaintiff has of course shown clearly that the work was difficult, beyond the capacity of many machine shops, but we do not think that difficulty is *per se* what Congress had in mind. That the work often required a number of machining operations on the same part in sequence, is perhaps more to the point, but it would require to be developed.

Thus, in summary, plaintiff receives favorable consideration under several factors and unfavorable under none. Therefore, the raw base period earning percentage of 7.09 must be adjusted upward. The adjustments proposed by defendant are glaringly insufficient. If adjustments are made according to the suggestions offered *supra*, by additions to the starting point allowable profit set at the 7.09 percent rate, the result appears to be that the excessive profits are reduced to approximately $45,000 for the years 1968 and 1969 combined. The plaintiff receives clearances for both years, however, for two independent reasons. Under RBR § 1460.5(a) no refund will be required if the portion of the profits ascertained for each year to be excessive does not exceed $40,000. The factor evidence having been received in a consolidated trial, we do not think it would be other than arbitrary to allocate over $40,000

to any one year. The other reason is that defendant failed to sustain its burden of proof as to factor application, in particulars that will be explained.

At the trial, plaintiff presented first its *prima facie* case, as we required it to do in *Lykes Bros. S. S.* v. *United States*, 198 Ct. Cl. 312, 459 F. 2d 1393 (1972). This consisted of a mass of business records and financial exhibits, plus testimony by Mr. Butka and others, tending to support its claim to favorable consideration under several statutory factors. Defendant argued in its briefs that this was not a complete *prima facie* case, though it had not moved to dismiss on that ground when plaintiff rested. It relied on the fact that plaintiff offered no expert testimony, and left its counsel to explicate how the testimony supported a clearance determination. On oral argument, defendant's counsel abandoned this position saying it was foreclosed by *Aero Spacelines Inc.* v. *United States*, 208 Ct. Cl. 704, 530 F. 2d 324 (1976). This would seem correct, and the precedents of this court, here reaffirmed, are that the contractor's *prima facie* case does not have to be dismissed as insufficient because it does not include expert testimony. This is not to say that testimony by a qualified expert, for plaintiff, would not be very helpful to the court.

Under *Lykes* the burden now shifted to defendant, who undertook to sustain it with an expert. He conceded that plaintiff was entitled to favorable consideration under several statutory factors, pointing to none that were unfavorable. His quantification of the amounts, in dollars, these factors would require to be added to his "starting point" percentage of 7.09 percent, "bonuses" as he called them, was wholly inadequate, and indeed, added nearly 50 percent to the refund figures even the Renegotiation Board had proposed.

Confronted with claims to favorable consideration of this kind, defendant could either refute them or concede them. If it did the latter, as in several instances here, it would seem the burden of proof would require defendant to put a cap on the claim, *i.e.*, supply something to enable the court to determine its limits. Take, for example, Mr. Butka's claim that he gratuitously assisted other qualified AVCO subcontractors

to produce parts they could not produce for themselves. This was clearly creditable under the statute, as pointed out above. But there is nothing to show the quantities. If, for example, AVCO by this aid obtained $20,000,000 worth of parts from others than Butkin, that it could not have obtained otherwise, a very modest allowance for Butkin would practically subsume all other factor analysis and require a clearance all by itself. If, however, it was a matter of only $50,000 worth of parts, it would reflect favorably on Mr. Butka but would have no large effect on the determination. Since the burden of proof is on defendant, it would seem the court if left unaided is required to presume that the larger figure is the right one. It is hard to see what else the burden of proof could mean in this context. It would perhaps be different if the desired information were unreachable for defendant. However, as we have said, AVCO kept its subcontractors under a very close watch, and it seems obvious that the FBI agents who put in 206 days on the case could have obtained this information if so ordered. AVCO asked Mr. Butka for this assistance, and it would be most unlike a company of its kind not to know how effective the assistance was. Rather defendant elected the position that Butkin's processes were really very simple, and within the capacity of any expert machinist. If the trier of fact had believed this, of course, as to this issue, defendant's troubles would have been over, but he did not. We required plaintiff to put on its *prima facie* case, largely to safeguard defendant against being surprised by testimony of this kind, after it had rested.

If, as here, there are impressive claims for favorable factor consideration, conceded or supported by preponderating evidence, if they are readily quantifiable in nature, and if the record fails to provide such quantification, it would seem the party having the burden of proof must lose.

By a parity of reasoning, if defendant was not willing to let Finding 17 speak for itself as to the savings AVCO accomplished by dealing with Butkin, defendant was the party that should and could have obtained price and bidding comparisons, as to Butkin's fellow subcontractors for AVCO.

Any fact statements in this opinion may be regarded as additional findings of the court if they do not have counter-

parts in the formal findings. The judgment of the court is stated in the "Conclusion of Law" which follows the Findings.

FINDINGS OF FACT

1. Plaintiff began as a small precision machine shop in 1954 when the plaintiff's president, John Butka, started producing parts with a few used machines in his mother's basement. The business grew gradually as Mr. Butka's skill and ingenuity became known; in 1957 the business was incorporated under the laws of the State of Connecticut, with its principal place of business in Milford, Connecticut. Mr. Butka owns all of the stock in the plaintiff corporation.

2. During its fiscal years ended July 31, 1968 and July 31, 1969, virtually all of plaintiff's total business, and 100 percent of its renegotiable business, consisted of the manufacture of various parts for the T–53 and T–55 gas turbine engines under subcontracts with the Lycoming Division of AVCO Corporation (hereafter "AVCO"), which engines were used in various military aircraft during the Vietnam War.

3. AVCO has produced various experimental and production versions of the T–53 and T–55 engines since 1958. Plaintiff became involved as a subcontractor with AVCO near the beginning of that engine program, in the late 1950's, when it began producing prototype parts for the T–53 and T–55 engines for AVCO's experimental department. Plaintiff continued to manufacture parts for the T–53 and T–55 engines subsequently, and in the mid-1960's decided to devote its entire business to production for AVCO in support of the Vietnam War. By 1969, approximately 99% of Butkin's work was for AVCO.

4. Plaintiff employs the accrual method of accounting. Its sales are recorded on its books at the time of shipment and rendering of an invoice, and costs are recorded when incurred. It has never employed a cost accounting system under general ledger control, and costs have been allocated to renegotiable business in the same ratio that renegotiable sales bear to total sales. Plaintiff does maintain job order cost records, not under general ledger control, in which direct labor, material and subcontracting costs are posted.

Findings of Fact

5. For its fiscal year ended July 31, 1968, plaintiff's total sales were $2,343,484 of which $2,290,821 were renegotiable sales and $714,818 were renegotiable profits. Renegotiable sales constituted 97.5% of plaintiff's total sales in that year, and renegotiable profits constituted 31.2% of renegotiable sales. For its fiscal year year ended July 31, 1969, plaintiff's total sales were $2,844,008 of which $2,823,448 were renegotiable sales and $785,075 were renegotiable profits. Renegotiable sales constituted 99.28% of plaintiff's total sales in that year, and renegotiable profits constituted 27.8% of renegotiable sales.

6. During its fiscal years 1960 through 1972, covering substantially all of the years of plaintiff's involvement with the AVCO T-53 and T-55 engine program, its total sales, the percent of such sales constituting AVCO sales, its total profits and total profit rate as a percent of sales were as follows:

FYE July 31	*Total Sales*	*% AVCO Sales*	*Total Profit*	*Profit as % of Sales*
1960	$294, 719	48. 17	$11, 035	3. 74
1961	288, 673	52. 34	(21, 877)	(7. 58)
1962	442, 746	60. 09	36, 373	8. 22
1963	495, 940	86. 19	22, 305	4. 50
1964	563, 228	95. 22	40, 747	7. 23
1965	544, 512	67. 52	(36, 083)	(6. 63)
1966	819, 482	65. 27	27, 487	3. 35
1967	1, 357, 487	86. 56	197, 688	14. 56
1968	2, 343, 484	97. 75	730, 667	31. 18
1969	2, 844, 008	99. 28	790, 244	27. 79
1970	1, 934, 624	93. 1	31, 340	1. 6
1971	893, 278	46. 6	(277, 091)	(31. 0)
1972	754, 423	33. 3	(97, 806)	(13. 0)

7. During fiscal 1968 and 1969 there were between 500 and 700 machine shops throughout the United States which were producing parts for the T-53 and T-55 engines. Of that group, approximately 25 to 30 vendors, were regarded as "exceptional" vendors capable of producing parts of the nature and complexity manufactured by plaintiff.

8. In fiscal 1968 and 1969 and in earlier years plaintiff's renegotiable business was complex, involving design of fixturing, tooling, machining and assembly of approximately 75–100 different types of special design aircraft engine parts. The production of such parts involved extremely close tolerances, often to one ten-thousandth of an inch, and the use of

sophisticated metals. Production of such parts required a high degree of skill, precision, and ingenuity. The manufacture of each of the parts produced by Butkin required it to prepare detailed operation drawings, also known as "process sheets," which outline each of the steps required in production. The production of some parts required as many as 600 separate operations.

9. In plaintiff's type of business, which is a job shop operation, it is customary for firms to bid on the basis of and perform individual production orders strictly as a machining operation without building tooling, or by building inexpensive "soft" tooling and fixturing of a temporary nature which would be durable enough to produce the quantity involved for the particular order. In plaintiff's case, although it would bid for initial orders on the same basis as did its competitors in order to obtain such orders often it decided to invest substantial sums in building long-lasting, "hardened and ground" tooling, capable of being used to produce large quantities of such parts, in high quality and with a lower direct labor cost. Plaintiff would decide to invest in such tooling where it felt that there existed a likelihood of future demand for particular parts, even though there was never any assurance that future orders would be forthcoming. Sometimes future orders for particular parts did not occur, if for example the part was designed out of the engine or significant changes were made in specifications, and plaintiff's investment in tooling was lost. Where future orders did occur, typically, the tooling investment would not be recovered until the production of several follow-on orders, after which plaintiff began realizing profits in its overall production of a particular part.

10. Plaintiff's practice of investing in hardened and ground tooling, on the possibility of future follow-on orders, was characteristic of its method of operation. Defendant's expert witness described this method of operation as "quite rare" in the industry, because of the risks of loss involved. The plaintiff built substantial amounts of such tooling beginning during the period 1962–65 and even in earlier years, and much of it was used in later years. Plaintiff's sales, tooling

costs, and tooling costs as a percent of sales, are as follows for the years 1962 through 1969:

Fiscal Year	*Sales*	*Tooling Costs*	*Percent of Sales*
1962	$442, 746	$164, 109	37
1963	495, 940	194, 404	39
1964	563, 228	159, 107	28
1965	544, 512	325, 073	60
1966	819, 482	428, 151	52
1967	1, 357, 487	542, 785	40
1968	2, 343, 484	577, 644	25
1969	2, 844, 008	625, 844	22

11. During fiscal 1968 and 1969 and in earlier years, plaintiff provided all of its own working capital, equipment, tooling and all but a small portion of its materials. All of its renegotiable business was under firm fixed price contracts. At no time did the company receive progress payments of any kind from its prime contractor. In FY 1968, subcontracting represented 9% of plaintiff's total manufacturing charges and in FY 1969 the amount of subcontracting was 12%. The subcontract work involved mainly heat treating and plating of parts being processed by plaintiff.

12. During 1968 and 1969, Butkin achieved a high level of quantity and quality production. AVCO's Manager of Expediting testified that, based on their investigation, they found that plaintiff delivered more parts in a shorter time and with higher quality than any other source AVCO had. Defendant's expert witness, Edwin Lewis, testified that "* * * [plaintiff] has been, as indicated quite frequently in my testimony, very efficient" and that the "corporation has really done an excellent [job] in controlling its costs." The Manager of Purchasing of AVCO-Lycoming described the quality of plaintiff's products as "excellent" and stated that plaintiff "probably had the highest quality rating of our vendors that were doing this type of work."

13. Plaintiff's president, John Butka, worked in and was knowledgeable in all phases of the operation of the business and he and the other employees, as well as plaintiff's machines, worked and operated long hours during fiscal years 1968 and 1969, just as they had in prior years. Butka designed and built tooling in such a manner that unskilled personnel were able to perform machining operations with minimum

supervision during 1968 and 1969. Plaintiff's direct labor costs in its fiscal years 1968 and 1969, as a percent of sales, were 29 percent and 23 percent, respectively, compared with 44 percent, 41 percent and 37 percent in its fiscal years 1965, 1966 and 1967.

14. Plaintiff expanded its productive facilities to meet the increased volume in its fiscal years 1968 and 1969 by investing in plant, equipment and tooling in those and earlier years. The following figures are indicative of the growth of plaintiff's business:

Fiscal Year	*Average No. of Employees*	*Average Gross Fixed Assets*	*Net Sales*
1962	31	$133,234	$442,746
1963	36½	173,199	495,940
1964	38½	189,112	563,228
1965	39	192,000	544,512
1966	49½	237,391	819,482
1967	73½	346,245	1,357,487
1968	88	486,559	2,343,484
1969	101½	636,931	2,844,008

At the end of FY 1964 plaintiff had an investment of $88,642, net of depreciation, in fixed assets. By the end of FY 1969 fixed assets increased to $342,707, net of depreciation, due to facility acquisitions.

15. Defendant concedes plaintiff is entitled to favorable consideration for the risk the corporation assumed in expanding its productive facilities over the years.

16. Despite the large increases in plaintiff's renegotiable sales during the review years the quality of plaintiff's work remained high and overall rejection rates were low. This is indicative of increased effort and efficiency during 1968 and 1969.

17. Plaintiff's prices in its fiscal years 1968 and 1969 were approximately 11% lower than its prices during fiscal 1967. Substantially all of its subcontracts during fiscal years 1968 and 1969 were firm fixed price contracts obtained as a result of competitive bidding; plaintiff's prices were computed by AVCO as averaging 10% below the next higher bidder in its fiscal year 1968 and 16.7% below the next higher bidder in its fiscal year 1969.

18. In addition to its regular business, plaintiff in 1968, undertook to inspect, repair and complete approximately

1,150 pieces of Part No. 1–140–050–11, in various stages of completion, which were discrepant and/or potential scrap and which had been made by AVCO over a period of time. This was a salvage operation, plaintiff being assured of no compensation except and to the extent it could successfully correct the discrepancy and/or complete production of each part. Plaintiff was able to save and complete 952 of such parts, at a total price of $272,830. If plaintiff had not been successful in salvaging these parts, and AVCO had to make or procure new parts in substitution, AVCO would have had to pay approximately $595,000 based upon its in-house cost of $625 per unit, or $456,960 based upon plaintiff's then-current price of $480 for that part. Plaintiff's efforts on this job represent a savings to AVCO, and in turn the Government, of between $184,130 and $322,170.

19. The total assets and net worth reflected on plaintiff's balance sheets at the beginning of its fiscal year 1968 was $576,802 and $213,910, respectively. Its total assets and net worth at the end of that year were $950,458 and $568,076, respectively. The total assets and net worth reflected on plaintiff's balance sheets at the beginning of its fiscal year 1969 was $950,458 and $568,076, respectively. Its total assets and net worth at the end of that year was $1,364,305 and $938,781, respectively.

20. In addition to the assets reflected on its balance sheet, plaintiff possessed superior technical expertise and know-how during fiscal 1968 and 1969 and in earlier years. Additionally, two of plaintiff's most significant income-producing assets—its tooling and its process sheets—are not reflected as assets on the balance sheets because their costs were expensed.

21. In fiscal 1968 and 1969 and in other years, plaintiff, on many occasions, cooperated with AVCO in rendering assistance, contributing proprietary information and giving technical assistance to competitive sources of supply in the manufacturing of parts which those vendors and others were having difficulty making. Plaintiff received no compensation for this. The vendors to whom it rendered such assistance and the other vendors who were trying without success to make

these parts were highly-skilled machine shops and among the 25 top AVCO vendors called upon by AVCO for the type of parts manufactured by plaintiff. AVCO requested plaintiff to render such assistance because AVCO at all times maintained or attempted to maintain multiple producers of parts, in order to protect its engine commitments if one vendor was unable to deliver.

22. During fiscal 1968 and 1969 as well as earlier years, plaintiff and its president, John Butka, were inventive in solving production and other problems relating to the manufacture of parts. For example, plaintiff developed a device for testing the target flow of oil in Part No. 1–140–590–04 which was more accurate and less costly to develop than the one developed by AVCO for testing the same parts.

23. As a result of its ingenuity plaintiff was able to manufacture parts which its competitors were unable to make or had difficulty making. A good example of this was its development of a machine for the production of Part Nos. 1–140–189–02 and 1–140–191–02. This machine was developed at substantial cost and it enabled plaintiff to produce these parts more quickly and cheaply than had theretofore been possible through the use of conventional methods and to substantially reduce its prices for these parts. Defendant's expert testified that only in "very, very rare cases" would companies in the industry do what plaintiff did.

24. Defendant concedes that plaintiff performed a service to the United States Government by aiding it in its Vietnam effort and is entitled to favorable statutory consideration for its above average contributions to the defense efforts.

25. (a) Substantially all of the work performed during its fiscal years 1968 and 1969 (with the exception of its production of Parts Nos. 1–140–050–11 and 1–140–590–04) represented production of aircraft engine parts which plaintiff had manufactured in earlier years, some dating back to 1962 through 1965 and even earlier. The use of tooling built in earlier years was a major factor in plaintiff's success in maintaining high-quality standards during increased production in its fiscal years 1968 and 1969, and enabled it to reduce its prices on follow-on orders. Under plaintiff's method of ac-

counting, its tooling costs were expensed when incurred.

(b) During its fiscal years 1965, 1966 and 1967, and in earlier years, plaintiff's executive personnel and department heads were involved in the planning of processes and engineering with respect to the production of parts initially manufactured in those years and later manufactured during its fiscal years 1968 and 1969. Salary costs and associated overhead relating to these activities in prior years were expensed when incurred under plaintiff's method of accounting.

26. (a) The number of employees increased from 33 at the beginning of plaintiff's fiscal year 1965 to 115 as of the close of its fiscal year 1969. During its fiscal years 1965 through 1967, plaintiff trained new employees who were employed in production during fiscal 1968 and 1969.

(b) It is normal in plaintiff's business that it would not reach peak efficiency in producing a particular part until after several follow-on orders, as a result of a learning curve process in making the parts involved. With respect to parts produced by plaintiff in fiscal 1968 and 1969 which had been initially produced in prior years, it usually took longer to complete the first order than follow-on orders, and its scrap rate was usually higher on the first order than on follow-on orders. Often adjustments had to be made during initial production runs in the planning of processes, and in the design of tooling.

27. (a) During fiscal years 1962 through 1964, a substantially greater proportion of plaintiff's total business represented commercial work than in 1968 and 1969 and did not involve production of aircraft engine parts for AVCO. Defendant contends, and plaintiff apparently agrees, that work for AVCO was much more profitable than commercial work.

(b) During fiscal years 1962 through 1964, about half of plaintiff's business with AVCO consisted of prototype work for AVCO's experimental department, which plaintiff's president characterized as orders for "1, 6, 10, sometimes 30" units, and sometimes a slightly larger number depending on the nature of the part involved. This work was so small that parts could not be produced in a production-line type operation.

(c) During fiscal years 1962 through 1964, about half of plaintiff's business was production work, which consisted of orders for 100 or 200 units and sometimes 500 to 1,000. During those years plaintiff was in transition, moving into production-line type operations. Although many of plaintiff's production orders in 1962 through 1964 already represented follow-on orders, many of the orders were for small quantities of parts where plaintiff decided to build tooling on the gamble that it would later receive follow-on orders for such parts. Such follow-on orders were more forthcoming in fiscal years after 1965 as compared to 1962 through 1964. In 1968 and 1969, most of the work of plaintiff was of a production-line kind.

(d) Defendant introduced plaintiff's cost records relating to approximately 25 job orders performed during fiscal years 1962 through 1964. These were plaintiff's largest production orders for the period and were selected by defendant without reference to profitability. Based on a method of recomputation of costs advocated by defendant's expert, Edwin Lewis, plaintiff's profits on 25 of its larger production orders performed during its fiscal years 1962 through 1964 are $148,092.73 on sales of $556,767.01, or approximately 27% of such sales.

28. A major portion of plaintiff's business in FY 1969 was devoted to manufacturing two specific part numbers: Part Numbers 1–140–050–11 and 1–140–590–04, both aircraft jet engine housing assemblies. The work performed on these housing assemblies account for $1,176,000 or 41.4% of plaintiff's workload for 1969.

29. (a) Defendant's expert, Edwin Lewis, questioned the value of comparative industry data because "actual performance versus comparative industry performance is really valid only if you have enough information about comparable companies to make a comparable analysis. Otherwise, you're dealing with a fairly superficial type of analysis." He also testified that return on net worth and on capital was a "neutral" factor in this case.

(b) Defendant relies on the Internal Revenue Service's CORPORATION SOURCE BOOK OF STATISTICS OF INCOME for fiscal years 1968 and 1969 which discloses performance figures for

the aircraft and aircraft parts industry. The following chart compares Butkin's performance with others in that industry:

	*Return on Capital** (*percent*)	*Return on Net Worth** (*percent*)
Fiscal Years 1962–64:		
Butkin	31. 6	----------
Industry Comparison	8. 4	----------
Fiscal Year 1968:		
Butkin	132. 5	612. 70
Industry Comparison	12. 8	32. 75
Fiscal Year 1969:		
Butkin	108. 2	304. 30
Industry Comparison	5. 3	12. 10

*The figures for 1968 and 1969 have been adjusted to eliminate certain loans to Mr. Butka.

(c) As shown by the STANDARD INDUSTRIAL CLASSIFICATION MANUAL companies included in the classification of aircraft and aircraft parts run the gamut from manufacturers of guided missile nose cones to manufacturers of dirigibles, aircraft fuel tanks, or aircraft cowl flaps. The data relied on by defendant are not limited to manufacturers of aircraft engine parts. Also, next to virtually every income, deduction, asset and liability figure appearing in the source book for companies of Butkin's size for both 1968 and 1969, an asterisk appears, the asterisk being explained in the footnotes as follows: "Indicates estimate is subject to high sampling variability and should therefore be used with caution."

30. Defendant relies on two analytical approaches to support its contention that plaintiff realized excessive profits exceeding $980,000 for FY's 1968 and 1969 combined. These two approaches are the incurred cost approach and the return on capital approach.

31. (a) Under the incurred cost approach, actual performance of Butkin during the review years was compared with its actual performance in years selected as a base or historical norm, FY's 1962 through 1964. Plaintiff's incurred costs are computed by subtracting net profits from net sales. The net profit as percentage of cost incurred for FY 1962 is 8.951%, for 1963, 4.709%, and for FY 1964, 7.799%. The average net profit percentage for the 3 years combined is 7.089%. By applying this average profit percentage of 7.089% to the costs incurred during 1968 ($1,612,817) and 1969 ($2,053,764),

defendant calculates that plaintiff's profits should have been $114,333 for FY 1968 and $145,591 for FY 1969.

(b) In addition, defendant credits plaintiff with a 50% profit bonus for its effectiveness in controlling contract costs, above average efficiency and above average contributions to the defense effort. This profit bonus results in an addition of $57,167 to the profits for FY 1968 and $72,795 for FY 1969. Defendant further credits plaintiff with a bonus of 20% of plaintiff's year-end net investment in fixed assets. This 20% risk bonus adds $57,805 to profits for FY 1968 and $68,541 to profits for FY 1969.

(c) By subtracting these calculated profits allocable to renegotiable business from the total profits on renegotiable business, the excessive profits on renegotiable business under defendant's incurred cost approach are as follows:

	FY 1968	*FY 1969*
Reported or unadjusted profits allocable to renegotiable business—		
1968: 97.753% of $730,667	$714, 249	
1969: 99.277% of $790,244		$784, 531
Minus calculated profits allocable to renegotiable business	−224, 153	−284, 853
Excessive profits on renegotiable business	490, 096	499, 678

32. (a) Under the second method of analysis, the return on capital approach, the percentage return on the beginning capital for each of the three base years is computed. The overall average rate of return during the base years is 22.162%. Next, the capital employed during the review years, adjusted by excluding certain loans to John Butka for each year, is added to one-half of plaintiff's investment in productive facilities for each review year. Applied to that figure is the average rate of return during the base years—22.162%—which produces the following:

	FY 1968	*FY 1969*
Adjusted capital employed during review years	$551, 250	$730, 136
Profit computation at 22.162% of adjusted capital employed	122, 168	161, 813

(b) As with the incurred cost approach, defendant proposes a 50% and a 20% bonus for plaintiff in recognition of the statutory factors. The 50% bonus results in an addition

of $61,084 for FY 1968 and $80,906 for FY 1969. Defendant proposes to modify the risk bonus under this approach because the capital employed base incorporates recognition of plaintiff's fixed assets and leasehold-improvement additions during the review years. The risk bonus of 20% computed from a book of $289,024, less $69,098, which is the acquisition adjustment incorporated in capital employed for FY 1968, is $43,985. For FY 1969, the risk bonus is computed from a base of $342,707 less $88,028, which is the acquisition adjustment incorporated in capital employed, and results in a bonus of $50,936.

(c) Defendant calculates that excessive profits attributable to plaintiff under the return on capital approach are $492,118 for FY 1968 and $494,999 for FY 1969.

33. Based on the sample of 25 job orders during 1962–1964 (Finding 27(d)), plaintiff's profit as a percentage of incurred cost was 36%. Utilizing defendant's incurred cost approach, but employing 36% as the historical norm for production work, produces the following results:

	FY 1968	*FY 1969*
Incurred costs	$1, 612, 817	$2, 053, 764
Profits based on 36%	580, 614	739, 355
50% Profit Bonus	290, 307	369, 677
20% Risk Bonus	57, 805	68, 541
Reasonable Profit	$928, 726	$1, 177, 573

34. (a) As early as 1962 plaintiff decided to pursue renegotiable work in lieu of commercial activity. As a result, commercial sales declined from $136,856 or 30.19% of net sales in FY 1962 to $26,929 or 4.78% of net sales in FY 1964. By 1968, virtually its entire productive facilities were devoted to the performance of renegotiable business for AVCO. In 1970, demand for T–53 and T–55 engines dropped in comparison with 1968 and 1969, and AVCO decided to make rather than purchase a large number of the parts of the T–53 and T–55 engines. In calendar year 1970, AVCO shipped approximately 40% fewer engines than in calendar year 1969 and 47% fewer than in calendar year 1968. In calendar year 1971, AVCO shipped 70% fewer engines than in calendar 1968 and 67% fewer than in 1969. In calendar 1972, AVCO did not ship any T–53 and T–55 military engines.

Conclusion of Law

(b) As a result of AVCO's cutback in demand after 1969, plaintiff's production plummeted and it incurred substantial losses. It attempted without success either to obtain commercial business or work on other engine programs. The tooling it had built was of no use except in producing the part for which it was designed. By the end of 1969, because of extended wear and tear during fiscal 1968 and 1969, some of the machines had only junk value or were unusable and were put in storage, even though such machines showed a substantial undepreciated balance on plaintiff's books of account.

(c) Approximately 80 to 90 percent of plaintiff's competitors during 1968 and 1969 went out of business after 1969.

CONCLUSION OF LAW

Upon the foregoing findings of fact and opinion, which are made a part of the judgment herein, the court concludes and determines as a matter of law that plaintiff realized no excessive profits from contracts or subcontracts subject to renegotiation during its fiscal years 1968 and 1969. The court's orders of Jan. 10, 1975, entering judgment for defendant in both cases, are vacated to give effect to the foregoing conclusion of law. Judgment is hereby entered for plaintiff on defendant's counterclaims and it is ordered that plaintiff is entitled to a refund of all amounts paid to defendant, if any, together with interest as provided by the Renegotiation Act of 1951, as amended.

By stipulation for entry of judgment filed February 28, 1977, the parties advise the court that defendant has executed and delivered a release to plaintiff of all liens on security posted by plaintiff with defendant to cover the original judgments entered by the court on January 10, 1975, and further agreed that an order may be entered that no amount is due or owing to plaintiff from defendant under the court's opinion of October 20, 1976. On March 11, 1977 the court ordered and determined that no amount is due or owing plaintiff from defendant in these cases, and that plaintiff's petitions are dismissed.

Syllabus

545 F.2d 116

WASHINGTON MEDICAL CENTER, INC., ET AL. v. THE UNITED STATES

No. 359-72

1776 K STREET ASSOCIATES v. THE UNITED STATES

No. 333-73

METROPOLITAN CLUB OF THE CITY OF WASHINGTON v. THE UNITED STATES

No. 156-75

D. F. ANTONELLI, JR. v. THE UNITED STATES

No. 246-75

JACK KOGOK v. THE UNITED STATES

No. 247-75

[Decided October 20, 1976. Plaintiffs' suggestion for rehearing *en banc* and motion for rehearing and reconsideration denied January 7, 1977]

ON DEFENDANT'S MOTION AND CROSS-MOTIONS FOR SUMMARY JUDGMENT AND PLAINTIFFS' JOINT MOTION FOR SUMMARY JUDGMENT

Property; closing of District of Columbia "original" alleys and street; recovery of charges for closing; title to "original" streets and alleys.—In these consolidated cases, plaintiffs seek to recover moneys paid by them to the United States either for the closing of portions of various "original" alleys or of a portion of an "original" street in the District of Columbia (D.C.). These land areas were closed at plaintiffs' requests. Plaintiffs challenge the authority of the D.C. to impose a fair market value charge on the basis that the United States had no title to the closed alleys and street, that the D.C. has no statutory authority to make such charges under either Sec. 7-401 *et seq.* or Sec. 7-303 of the D.C. Code, that the areas closed had only nominal value, and that the charges were in violation of the District of Columbia Administrative Procedure Act and due process of law. It is *held* that the United States had fee simple title to the original street and to the original alleys involved in these cases, portions of which were closed and sold by the D.C. Council as agent of the United States to the respective plaintiffs, and that the Council was fully authorized by

Syllabus

statutes enacted by Congress to make such closings and sales and to charge and collect the amount of the fair market value thereof, as determined by the Council, from the plaintiffs in accordance with the statutes, and that by reason thereof the plaintiffs are not entitled to recover. Plaintiffs' joint motion for summary judgment is denied, defendant's motion and cross-motions for summary judgment are granted and the petitions are dismissed.

Property; streets; title to "original" streets in District of Columbia.

[1] In view of the holding by the Supreme Court in *Van Ness* v. *City of Washington*, 29 U.S. (4 Pet.) 232 (1830), that the United States acquired a fee simple title to the streets and public squares in the City of Washington under certain deeds of trust wherein the original proprietors conveyed all the lands to the United States in fee simple for the use of the United States forever and such of the squares, parcels and lots as the President shall deem proper for the use of the United States, fee simple title to the "original" streets was and is vested in the United States.

District of Columbia ⇐ 22

Property; alleys; title to "original" alleys in District of Columbia.

[2] The agreements with and the conveyances from the original proprietors of all the lands in the City of Washington to the United States in fee simple gave President Washington full power and authority to vest fee simple title in the United States to "original" alleys, which he consummated in regulations issued October 17, 1791 by reserving to the public the way into the square the property in the same.

District of Columbia ⇐ 22

Evidence; weight and sufficiency of evidence.

[3] Where the only proof plaintiffs offer in support of their assertion that purchasers of original lots paid for portions of alleys and that title to such portions passed to the purchasers, are copies of plats of the original squares involved with apportionments (in which alleys are not mentioned) made by the commissioners between the United States and the proprietors, the plats bearing certain unintelligible and illegible unproven figures relating to alleys which plaintiffs say are on file in the Registers of Squares, absent evidence to prove that the registers of squares were contemporaneous and original books which it was the duty of the commissioners to keep, effect cannot be given to such registers to contradict or override the plans of the city adopted by the President.

District of Columbia ⇐ 22

Property; quieting title.

[4] In suits to quiet title and in trespass to try title, a plaintiff can recover only on the strength of his own title and not on the weakness of defendant's title. This principle applies in the present actions wherein plaintiffs seek to recover money paid by them to the United States for the closing of portions of certain "original"

Syllabus

alleys and a street in the District of Columbia on the basis that the United States did not have title thereto. Absent proof that plaintiffs have fee simple title to the alleys and street, they cannot prevail.

Quieting Title ⇐ 10(1)
District of Columbia ⇐ 22

Property; streets/alleys; sale of abutting property; title to streets and alleys.

[5] Plaintiffs' contention that when lots abutting on the subject street and alleys in the District of Columbia were sold, the street and alleys passed to the purchasers as appurtenances to the abutting lots is without merit since land cannot be appurtenant to land,

District of Columbia ⇐ 22

Property; alleys; title to "original" alleys in District of Columbia.

[6] Where an entire square abutting an "original" alley was sold by the Commissioners of the District of Columbia, the United States did not give up or lose its title to the alley, absent facts of a contrary import; the presumption is that the United States intended to keep the fee simple title and that the grantee so understood.

District of Columbia ⇐ 22

Property; streets/alleys; sale of abutting property; title to streets and alleys.

[7] When Maryland ceded land to the United States for the City of Washington and the proprietors conveyed the land in fee simple to the trustees, the sovereignty of Maryland over the land ceased and that of the United States attached, and the common law no longer controlled or applied to the establishment of the subject street and alleys. Thus, where the city has title to streets and alleys, title of the owners of the abutting lots extends only to the line of the streets and alleys and not to the center thereof.

District of Columbia ⇐ 22

Property; streets/alleys; sale of abutting property; title to streets and alleys.

[8] The provisions of Sec. 7-307 of the D.C. Code respecting replacement of an original alley by a new alley and cessation of the proprietary interest therein of the United States are inapplicable where plaintiffs own only a few lots in their respective squares. Thus, they did not acquire title in fee simple to the alleys.

District of Columbia ⇐ 22

Statutes; construction and operation; alleys in the District of Columbia.

[9] The intention of Congress in enacting various laws for the closing, sale, etc. of alleys in the City of Washington was to preserve the difference between alleys owned in fee simple by the United States and common law alleys dedicated by developers or abutting property owners which are owned by the District of

Syllabus

Columbia. In using the terms "original alleys, the fee of which is in the United States" and "original alleys", the court concludes that Congress used these terms interchangeably and that they have the same meaning. When Congress referred to or described an alley as an "original alley" it was its intent and purpose to refer to and describe alleys that were originally laid out in the City of Washington in which the fee simple title was vested in the United States.

District of Columbia ⟸ 22

Property; alleys; District of Columbia Code; construction and operation.

[10] Sections of the D.C. Code dealing with the closing, sale, etc. of original alleys in the City of Washington are not mutually exclusive, it being the intent of Congress that all of the relevant sections be considered together and in the conjunctive, i.e. the authority and power granted in one section extends to and applies to each of the other sections. Thus, although Sec. 7–303 of the D.C. Code does not provide for the charging of money for the closing of original alleys, such collection of money is proper under Sec. 7–302.

District of Columbia ⟸ 22

Statutes ⟸ 223.2(21)

District of Columbia; alleys and streets.

[11] The law with respect to the closing of a common law dedicated nonoriginal street or alley is not applicable to the closing of original streets and alleys owned by the United States.

District of Columbia ⟸ 22

Property; streets and alleys; closing and sale; valuation.

[12] Since Congress fixed the selling price of original streets and alleys owned by the United States "at a price not less than the assessed value of contiguous lots" (Sec. 7–302 of the D.C. Code), and plaintiffs agreed without protest to pay the values determined by the City Council for closing the subject street and alleys at plaintiffs' requests, it is now too late for plaintiffs to protest the values for the first time in this court.

District of Columbia ⟸ 22

Property; streets and alleys; closing and sale; valuation.

[13] The rule as to value of property in condemnation cases does not apply to the sale of original streets and alleys in the City of Washington in which the fee simple title is vested in the United States and the Congress has fixed the selling price by statute.

District of Columbia ⟸ 22

District of Columbia; alleys and streets; promulgation of rules and regulations.

[14] The mere failure of the City Counsel to compile rules and regulations relating to the closing of original streets and alleys pursuant to the D.C. Administrative Procedure Act, absent allegations and

Opinion of the Court

proof on plaintiffs' part that such failure denied them a right to which they were entitled under the law, does not change or supersede Sec. 7-302 of the D.C. Code enacted by Congress authorizing original streets and alleys to be closed and sold and charges made therefor.

District of Columbia ⊜ 22

Lawrence A. Miller, attorney of record for plaintiff in No. 333-73.

Whayne S. Quin, attorney of record for plaintiffs in cases numbered 359-72, 156-75, 246-75 and 247-75. *Wilkes & Artis* and *Glenn D. Simpson*, of counsel.

Thomas L. McKevitt, with whom was *Assistant Attorney General Peter R. Taft*, for defendant.

Before COWEN, *Chief Judge*, DURFEE, *Senior Judge*, and SKELTON, *Judge*.

SKELTON, *Judge*, delivered the opinion of the court:

In these five consolidated cases four of the plaintiffs sue the United States to recover money paid by them to the United States for the closing of certain portions of various original alleys in the city of Washington, D.C., and the remaining plaintiff sues the Government to recover the amount paid by him to the United States for the closing of a portion of an original street in said city, namely, G Street, N.W.[1] The defendant contends that the charges made for the closing of the portions of the alleys and G Street were proper and in accordance with laws enacted by the Congress, and that the plaintiffs should be denied any recovery. The case is before us on cross-motions for summary judgment.

After carefully considering the pleadings, evidence, briefs, and the argument of counsel, we conclude that the plaintiffs are not entitled to recover and we hold for the defendant.

The facts involved in these cases are generally as follows. The plaintiff, Washington Medical Center, Inc., joined by William J. Cusack and Frances S. Cusack and Mary C. Morgan, 1776 K Street Associates, the Metropolitan Club of

[1] "Original alleys" and "original streets" are those alleys and streets that were laid out and provided for in the original Federal City of Washington in the District of Columbia.

the City of Washington, and D. F. Antonelli, Jr., were the owners of various lots abutting certain portions of original alleys in the original squares listed below.[2] None of these plaintiffs owned all of the lots in an entire square. The plaintiff Jack Kogok owned certain lots abutting on a portion of G Street, N.W. All of the plaintiffs desired to have the portions of the alleys and street (in the case of Kogok) closed so that they could erect buildings or other improvements thereon. Accordingly, they filed applications with the City Council (formerly the City Commission) of Washington, D.C., the duly authorized agent of the United States, to close the portions of the alleys and street on which their lots abutted. The council acted favorably on the applications of the plaintiffs provided that the plaintiffs would pay "a price not less than the assessed value of contiguous lots." The plaintiffs agreed to such payments and the council determined and found that the proper payments to be made by the plaintiffs, respectively, for the closing of the portions of the alleys in the squares and street listed below were as follows:

Plaintiff	Squares	Fair market value
(a) Washington Medical Center	107	$247, 701. 60
(b) 1776 K Street Associates	126	74, 769. 05
(c) Metropolitan Club	166	63, 725. 40
(d) D. F. Antonelli, Jr.	252	30, 766. 00
(e) Jack Kogok	G Street, N.W.	34, 700. 00

The plaintiffs represented to the council that they were willing to pay the above amounts, respectively, if the council would close said portions of the street and alleys, and, in reliance on such representations, the council made such closings. The plaintiffs voluntarily, and without protest, paid the above amounts found by the council to be due by them, respectively, and in fact were eager to do so. Title to the closed portions of the street and alleys was vested by the council in the respective plaintiffs upon their closings and thereafter the plaintiffs erected buildings or other improvements thereon. At all times the plaintiffs and the council conducted these transactions on the theory that the United States had fee

[2] When the city of Washington, D.C. was laid out and platted, the equivalent of modern day city "blocks" were called "squares." They are still referred to in that manner in the decided cases and laws and will be referred to as such in this opinion.

simple title to these original alleys and to original G Street, N.W. The money paid by the plaintiffs was deposited in the United States Treasury to the credit of the United States.

Within three years after the street and alleys had been closed, all of the plaintiffs filed suits in the District Court of the District of Columbia for a refund of the payments they had made for such closings. The suits were against the District of Columbia and the United States. In those suits the plaintiffs relied on the decision of the district court in the case of *Carr* v. *District of Columbia*, 312 F. Supp. 283 (D.D.C. 1970) which held that the District of Columbia could not charge abutting property owners for the closing of a non-original alley under the Street Readjustment Act of 1932, D.C. Code § 7–401, and that it could not charge them for the depreciated value to nearby property caused by the closings. The D.C. Court of Appeals affirmed without an opinion.

In their district court suits for refunds, the plaintiffs included claims for portions of the closed alleys that were not a part of the original alleys involved here, but were common law dedicated portions of the closed alleys owned by the District of Columbia for which the council charged them. They also asked for refunds for the amounts (not involved here) for the alleged depreciated value of nearby property caused by the closings. Included in those suits were also the identical claims involved here for refunds of the amounts paid to the United States for the closing of the described portions of the *original* alleys and original G Street, N.W. On January 8, 1974, the district court entered orders in those cases (Civil Actions Nos. 1906–72, 2514–72, 1905–72, 660–72, 1093–71 and 2015–70) holding that the District of Columbia could not charge abutting property owners the fair market value of alleys *owned* and closed by the District of Columbia unless an objection to the closing has been made, nor charge for the depreciated value of nearby property caused by the closing, "notwithstanding the fact that a portion of the land in Square * * * was original U.S. property." The court entered judgment for the plaintiffs on such claims, but dismissed the United States from the suits because of lack of jurisdiction. In the course of the appeal the plaintiffs raised for the first time the proposition that the United States did not have title

to the original alleys and the original street that were closed and by reason of that fact could not charge the plaintiffs for the closings. On June 20, 1975, the D.C. Circuit Court of Appeals affirmed in cause No. 73–2053 the judgment of the district court without opinion and without passing on the title question. Thereafter, the plaintiffs filed the present suits.

Plaintiffs in this action challenge the authority of the District of Columbia to impose a fair market value charge on the basis that (1) the United States had no title to the original street and original alleys that were closed, (2) the District of Columbia has no statutory authority to make such charges under either § 7–401, *et seq.* or § 7–303, (3) the land areas closed had only nominal value, and (4) the charges were in violation of the District of Columbia Administrative Procedure Act and due process of law.

The defendant says that (1) the plaintiffs are estopped by their prior actions from claiming the refunds, and (2) in any event the United States had fee simple title to the original street and the original alleys, and the District of Columbia was fully authorized by Acts of Congress to make the charges for closing the street and alleys involved here.

There is much support for defendant's estoppel argument and it may be that these cases could be disposed of on that basis. The closing of the street and alleys was a discretionary act on the part of the council. The plaintiffs had no constitutional right to have the street and alleys closed. Under these circumstances, the plaintiffs themselves affirmatively initiated the closing procedures by filing their closing applications with the council. They represented to the council that they were willing to pay the charges fixed by the council if the street and alleys were closed, and they intended for the council to rely on these representations. The council did rely on them and closed the street and alleys to the detriment of the city and the United States in that the closed portions of the street and alleys could no longer be used for travel or traffic, garbage pickup, access by police, ventilation, passage of fire trucks, and the installation of utility lines such as gas, telephone, water, sewer, and electric light and power. The plaintiffs voluntarily and willingly paid the charges for the closings without any protest whatever as to title or as to the

procedure followed by the council in closing the street and alleys. The title to the closed portions of the street and alleys was vested in the plaintiffs by the council and the property was delivered to them. Thereafter the plaintiffs erected buildings and other improvements on the property and have enjoyed the possession and use of the property since the dates of the closings and they or their successors in title will continue to use and enjoy the same for all time to come. From these facts, it appears that most if not all of the elements of estoppel against the plaintiffs and their claims are present in this case. The plaintiffs say that estoppel cannot be used against them, citing the case of *1776 K Street Associates* v. *District of Columbia*, No. 73–2053 by the D.C. Circuit Court of Appeals. In that case the D.C. District Court held that estoppel would not apply against the plaintiffs who were suing for a refund of money paid by them to the District of Columbia for the closing of a *non-original* alley *owned by the District of Columbia*, because the District of Columbia Council had no authority to make such charges for the closing of an alley of this type owned by the District of Columbia, citing *Carr* v. *District of Columbia*, 312 F. Supp. 283 (D.D.C. 1970), aff'd mem., No. 24,406 (D.C. Cir. Sept. 28, 1971) another *non-original* alley closing case. The holding on estoppel in the above *1776 K Street Associates* case is clearly inapposite in the present case because the decision there was based on the lack of authority of the District of Columbia Council to charge for the closing of a non-original alley owned by the District of Columbia, whereas, in the instant case we are dealing with an *original* street and *original* alleys which the defendant contends are owned in fee simple by the United States and which Congress has authorized to be closed and charges collected therefor by the District of Columbia Council as its agent. There is no lack of authority of the council to make the charges in this case.

Although, as pointed out above, it may be that we could dispose of these cases against the plaintiffs on the doctrine of estoppel, we have decided not to do so. We have concluded that the crucial and controlling question is the title issue, and that it should be decided not only for the purpose of disposing of the present cases, but also as a precedent for the solution

of other like claims we understand are pending, and others that will no doubt arise in the future. A decision of the title issue is vital, because if the United States owned the street and alleys in fee simple at the time of the closings, Congress had the power to authorize the District of Columbia Council to charge for their sale (closings, and vesting of title in plaintiffs), because they were Government property. On the other hand, if the United States did not have title in fee simple to the street and alleys at the time they were closed, Congress would not have the power to authorize the council to charge for their closing, as the Government cannot sell property it does not own. In the latter case, the charges would be unauthorized and the plaintiffs would be entitled to refunds of the money paid if the plaintiffs themselves had title to the property.

In order to decide the title question, it is necessary to go back in history to the time of the founding of the Federal City of Washington.

The interesting history of the founding of the city of Washington, is set out in much detail in *Morris* v. *United States*, 174 U.S. 196, 245–259 (1898) (maps at 220–221), in somewhat more abbreviated form in *Van Ness* v. *City of Washington*, 29 U.S. (4 Pet.) 232 (1830), and, in shorter form in *Fitzhugh* v. *United States*, 40 F. 2d 797, 798–799 (D.C. Cir. 1930). The high points of that history are as follows:

Under the Charter of June 20, 1632, from Charles I, King of England, Cecilius Calvert, the first Lord Proprietary of the Province of Maryland, was granted all lands now embraced within the District of Columbia. After the American Revolution, Maryland became a state and succeeded to all rights of the Lord Proprietary, including the absolute right to the soil for use by the people of the new sovereignty.

The State of Maryland authorized cessation to the United States of the territory which is now the District of Columbia. (Act of December 23, 1788, Maryland Laws 1788, Chapter 46, D.C. Code p. XXX (1973)). By Act of Congress, adopted July 16, 1790 (1 Stat. 130, Ch. 28; D.C. Code p. XXXIII), as amended by Act of Congress approved March 3, 1791 (1 Stat. 214, Ch. 17; D.C. Code p. XXXIV), the cession was accepted

and the President of the United States was authorized to appoint three commissioners whose duty was to "survey, and by proper metes and bounds define and limit" such district or territory.[3] The Act empowered the commissioners "to purchase or accept such quantity of land on the eastern side of * * * [the Potomac River] for the use of the United States, and according to such plans as the President shall approve." Additionally the commissioners were required to provide suitable buildings for the accommodation of public offices prior to the first Monday in December 1800, at which time the seat of government would be transferred to the Federal City.

On January 24 and March 30, 1791, the President by proclamation located and defined the limits of the District of Columbia and appointed the commissioners who, with their successors, located and laid out the city of Washington. (D.C. Code, p. XXXIV and XXXV (1973)). The general boundaries of the proposed city now called the "original" city were the Eastern Branch, the Potomac River, Rock Creek to a point near P Street, N.W., then following what is now Florida Avenue to 15th and H Streets, N.E., then south to C Street, N.E., then east to 20th Street and then south to the Eastern Branch. The land within was devoted mostly to farm purposes owned principally by 19 owners hereinafter sometimes referred to as "original proprietors."

While various maps and plans for the city were being prepared under the direction of the President and the commissioners, negotiations were being entered into between the commissioners and the original proprietors which resulted in agreements executed by the parties providing for the disposition of the land within the original city pursuant to deeds of trust to be executed. The agreements, signed March 13, 1791, provided as follows:

> "We, the subscribers, in consideration of the great benefits we expect to derive from having the Federal City laid off upon our lands, do hereby agree and bind ourselves, our heirs, executors and administrators, to convey in trust to the President of the United States, or Com-

[3] On January 22, 1791, President Washington appointed Thomas Johnson, Daniel Carroll and David Stuart as such commissioners. *See Morris* v. *United States*, *supra* at 250.

missioners, or such person or persons as he shall appoint, *by good and sufficient deeds in fee simple, the whole of our respective lands* which he may think proper to include within the lines of the Federal City, for the purposes and on the conditions following:

"*The President shall have the sole power of directing the Federal City to be laid off in what manner he pleases. He may retain any number of squares* he may think proper for public improvements, *or other public uses*, and *the lots only* which shall be laid off *shall be a joint property between the trustees on behalf of the public and each present proprietor*, and the same shall be fairly and equally divided between the public and the individuals, as soon as may be after the city shall be laid out.

"*For the streets the proprietors shall receive no compensation, but for the squares or lands in any form which shall be taken for* public buildings or any kind of public improvements *or uses*, the proprietors, whose lands shall be so taken, shall receive at the rate of twenty-five pounds per acre, to be paid by the public," etc. [Emphasis supplied.] [*Morris* v. *United States*, *supra*, at 247–48, and *Van Ness* v. *City of Washington*, *supra*, at 276.]

On June 29, 1791, the proprietors executed deeds, all of which were identical, to Thomas Beall and John M. Gantt, trustees, who had been designated by the President, to consummate the agreement of the preceding March with the commissioners. All of the deeds conveyed all of the lands of the proprietors within the bounds of the city in fee simple upon the following trusts:

* * * "*That all the said lands*, &c., as may be thought necessary or proper to be laid out, together with other lands within the said limits, for a federal city, *with such streets*, squares, *parcels* and lots as the president of the United States, for the time being, shall approve; and that the said (the trustees), &c., shall convey to the commissioners for the time being, appointed by virtue of the act of congress, entitled, &c., and their successors, *for the use of the United States for ever*, *all the said streets*, *and such of the said squares*, parcels and lots, *as the president shall deem proper*, *for the use of the United States;* and that as to the residue of the said lots into which the lands, &c., shall be divided, a fair and equal division of them shall be made, and if no other mode of division shall be agreed on, by consent of the said (grantor), &c., and *all the said lots* which may in any manner be divided or as-

signed to the said (grantor) shall thereupon, &c., be conveyed by the said (trustees) to the said (grantor), his heirs and assigns; and that the *said other lots* shall and may be sold at such time, &c., as the president of the United States for the time being shall direct; and that the *said* (*trustees*), &c., will, on the order and direction of the president, *convey all the lots so sold*, and ordered to be conveyed, to the respective purchasers *in fee-simple*, &c." * * * [Emphasis supplied.] [*Van Ness* v. *City of Washington*, *supra*, at 283.]

The Supreme Court in the *Van Ness* case then pointed out:

> * * * Provision is then made that the twenty-five pounds per acre, *to be paid by the United States for the squares, should be paid out of the proceeds of such sales, and the residue shall be paid to the president, as a grant of money to be applied for the purposes, and according to the act of congress. Provision is also made for other objects, not material to be mentioned, and for a conveyance of the trust property to such other persons as the president might thereafter direct, *in fee*, "subject to the trusts then remaining to be executed, and to the end that the same may be perfected." In pursuance of this last provision, Beall and Gantt, the trustees, made a conveyance of the premises, by an indenture, dated the 30th of November 1796, to certain commissioners appointed under the act of congress, subject to the trusts then remaining to be executed; and, among other things, conveyed to the commissioners all that part of the lands, &c., which had been laid off into squares, parcels or lots for buildings, and now remaining so laid off, in the city of Washington. [Emphasis supplied.] [*Van Ness* v. *City of Washington*, *supra*, at 283–84.]

In the *Van Ness* case, only the streets and public squares in Washington, D.C. were involved. The heirs of one of the original proprietors contended in the suit that under the above trust agreement the streets and public reservations had to remain such and if changed or sold by the Government, the title thereto would revert to the heirs of the original proprietors who were the plaintiffs in that case. The Supreme Court held that the United States acquired a fee simple title to the streets and public squares under the above deeds of trust from the original proprietors. The Court said:

> Now, upon such legal import, there do not seem grounds for any reasonable doubt. The streets and public

squares are declared to be conveyed "for the use of the United States for ever." *These are the very words, which by law are required to vest an absolute unconditional fee-simple in the United States.* They are the appropriate terms of art, if we may so say, to express an unlimited use in the government. If the government were to purchase a lot of land, for any general purpose, they are the very words which the conveyance would adopt, in order to grant an unlimited fee to the use of the government. There are no other words or references in the instrument, which control in any manner the natural meaning of them. There are no objects avowed on the face of it, which imply any limitation. How then can the court defeat the legal meaning and resort to a conjectural intent?

* * * But it is sufficient for us, that here there is a solemn conveyance, *which purports to grant an unlimited fee in the streets and squares, to the use of the United States;* * * *

* * * *If the United States possess, as we think they do, an unqualified fee in the streets and squares,* that defeats the title of the plaintiffs, and definitively disposes of the merits of the cause. [Emphasis supplied.] [*Van Ness* v. *City of Washington, supra* at 285–86.]

Of course, the title to the original alleys was not involved in that case, but we think the same reasoning should be applied to such alleys because they were included in the squares. The trust agreement conveyed *all* the lands of the proprietors in the city to the United States in *fee simple.* It is to be noted that the deeds conveyed such lands "for the use of the United States forever all the said streets, and *such of the said squares,* parcels and lots, *as the president shall deem proper, for the use of the United States.*" [Emphasis supplied.] As shall be shown below, President Washington, by a proclamation and regulations, reserved the property in the alleys for the use of the public (United States).

As for the original streets, the Supreme Court held in yet another case, namely, *Potomac Steamboat Co.* v. *Upper Potomac Steamboat Co.*, 109 U.S. 672 (1884), that the United States held fee simple title to all of the streets in the original city of Washington. The Court quoted with approval the above holding in the *Van Ness* case and stated:

It was accordingly decided in that case that *the ownership of the land over which the streets* in the city of

> Washington *had been laid out on the original plan was vested by the deeds of the proprietors in the United States* so completely and unconditionally that Congress might lawfully dispose of it to private persons, or otherwise convert it to any use whatever. [Emphasis supplied.] [*Id.* at 681.]

The Court stated further:

> Notley Young [one of the proprietors] and the successor to his title had no property in the street, not even the right to insist that it should be maintained as such. *The United States held its title to the land over which it was laid out*, for its own use, and not in trust for any person or for any purpose. [Emphasis supplied.] [*Id.* at 684.]

From these decisions and the agreement with the proprietors and their conveyances to the trustees, we hold that the fee simple title to the *original streets* was and is vested in the United States.[4]

As to the *original alleys*, we wish to emphasize that in the agreement with the proprietors it was provided:

> *The president shall have the sole power* of directing the federal city to be laid off in what manner he pleases. *He may retain* any number of squares * * * for public improvements or *other public uses;* and the *lots only* * * * shall be the joint property between * * * the public and each * * * proprietor and the same shall be * * * equally divided * * * for the *squares or lands*, in any form, which shall be taken for * * * *any kind of public improvements or uses*, the proprietors * * * shall receive * * * twenty-five pounds per acre to be paid by the public. [Emphasis supplied.]

The conveyances from the proprietors contained the following pertinent provisions:

> *The president shall have the sole power* of directing the federal city to be laid off in what manner he pleases. *He may retain any number of squares * * * for public*

[4] On December 19, 1791, the State of Maryland ratified the previous Act of Cession (Maryland Law 1791, Ch. 45; D.C. Code p. XXX) noting that agreements had been entered into between the commissioners and the original proprietors by the Deeds of Trust previously described and included in the ratification a specific proviso stating "That nothing herein contained shall be so construed to vest in the United States any right of property in the soil as to affect the rights of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States * * *."

> *improvements or other public uses*, and the *lots only* * * * shall be a joint property between * * * the public and each * * * proprietor and the same shall be * * * equally divided * * *.
>
> * * * [F]or the squares *or lands in any form* which shall be taken for * * * *any kind of public improvements or uses*, the proprietors * * * shall receive * * * twenty-five pounds per acre to be paid by the public. [Emphasis supplied.]

We interpret these instruments as giving President Washington full power and authority to vest a fee simple title in the original alleys in the United States. He did so by issuing in his own handwriting the following regulations on October 17, 1791:

> *The way into the square*, being designed in a special manner, for the common use and convenience of the occupiers of the respective squares, *the property in the same is reserved to the public*, so that there may be an immediate interference on any abuse of the use thereof by any individual to the nuisance or obstruction of others. The proprietors of the lots adjoining the entrance into the squares, on arching over the entrance and fixing gates in the manner the Commissioners shall approve shall be entitled to divide the space over the arching and build it up with the range of that line of the square.
>
> * * * * *
>
> These regulations are the terms and conditions under and upon which conveyances are to be made according to the deeds in Trust of the lands within the City.
>
> Signed G. Washington [5]

The controlling words in these regulations as far as the title to the alleys is concerned are:

> The way into the square * * * the property in the same is reserved to the public * * * [6]

The word "property" is defined in Webster's Seventh New Collegiate Dictionary, 1965 as follows:

> Ownership, something to which a person has legal title.

[5] On file in the National Archives in Washington, D.C.

[6] An original alley in the city of Washington, D.C. was called a "way into the square." In later years Congress referred to it as an alley and we will use the term "alley" in this opinion.

It is defined in The Living Webster Encyclopedic Dictionary of the English Language, 1971 as follows:

> That which one owns * * * goods or lands owned * * * ownership or right of possession, enjoyment, or disposal of anything, especially of something tangible * * *.

"Property" is defined in Black's Law Dictionary 1382 (4th ed. (Rev.) 1968) as follows:

> * * * [T]hat which belongs exclusively to one: * * *. The term is said to extend to every species of valuable right and interest. * * * More specifically, ownership; the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude every one else from interfering with it. The exclusive right of possessing, enjoying, and disposing of a thing. * * * The highest right a man can have to anything; * * *.

See also 73 C.J.S. *Property* § 1 (1951), where "property" is defined as follows:

> The word "property" means ownership, and it also means the right of ownership. In one sense "property" signifies the sum of all the rights and powers which are incident to ownership, and it means every right which accompanies ownership and is its incident, since all rights which pertain to the ownership of property are property. In the narrower sense "property" implies exclusive ownership of things, as where a man owns a piece of land or a horse, and thus the thing of which there may be ownership is called "property," as is whatever is exclusively one's own. The term is further defined as meaning that to which a person has a legal title, whether or not in his possession; but property in a thing does not consist merely in its ownership and possession. "Property" is sometimes defined as meaning estate, whether in lands, goods, money or intangible rights; and in the Blackstonian sense "property" means those things which one has the right to hold, possess, and enjoy to the exclusion of any other individual in the universe. [Footnotes omitted.] [*Id.* at 148.]

See also Words and Phrases, Vol. 34–A, *Property*, at 110, 114–15, 118; *Nashville, Chattanooga & St. Louis Ry Co.* v. *Wallace*, 288 U.S. 249 (1933); and *Texas Co.* v. *Hauptman*, 91 F. 2d 449, 451 (9th Cir. 1937).

The word "reserved" has the ordinary meaning of "retained," "kept" or "set apart." The word "public" means the "United States," which is the same meaning given to it in the agreements with the proprietors and as used in their conveyances to the trustees.

Therefore, we conclude that this reservation by President Washington had the same meaning and the same effect as if it had been worded as follows:

> The alley * * * the fee simple title in the same is retained in the United States * * *.

We hold that this reservation, together with the agreements with the proprietors and their conveyances of all their lands in fee simple to the trustees, vested fee simple title to the original alleys in the United States. This holding is supported by the fact that the United States has asserted sovereignty over these alleys, after the cession by Maryland of the land involved, for over 175 years. During this period of time the common reputation of the alleys was that they were owned by the United States. (See 73 C.J.S. *Property* § 17 (1951), *Id* at 213, ¶ *Common reputation.*) For almost two centuries everyone had recognized and understood that the United States had title in fee simple to the original alleys. The plaintiffs were of that opinion at the time the alleys in the instant case were closed. No one has ever raised the question until the plaintiffs injected it into these cases in what appears to be an afterthought to recover money they willingly paid for property they obtained and are now enjoying. The Congress has always believed that the United States owned the original alleys, as shown by the various laws it has passed relative to their closing and sale.

The plaintiffs claim that the purchasers of the original lots also paid for portions of the alleys and that the title to such portions passed to the purchasers and that plaintiffs succeeded to their title. The only proof by plaintiffs of such payments are copies of plats of the original squares involved with the apportionments made by the commissioners between the United States and the proprietors. In none of the apportionments are the alleys mentioned. At the bottom of the plats are certain unintelligible and illegible figures relating to alleys that plaintiffs say are on file in the Registers of

Squares and these are submitted as proof of their claims. These figures have not been proved up in a proper way and have no probative value whatever. The Supreme Court in the *Morris* case disposed of the same kind of evidence as follows:

> An effort is made to distinguish the case of these lots from that of the lots east of Seventeenth street by referring to a book marked "Register of Squares," produced from among the records of the city, and wherein squares 63 and 89 are bounded on the north by Water street and on the south by the Potomac River, and square 129 is bounded on the north by B street and on the south by the Potomac River.
>
> It was the opinion of the court below that there was a lack of evidence to prove that the registers of squares were contemporaneous and original books which it was the duty of the Commissioners to keep, that the entries were not in their handwriting, nor in that of any person whose handwriting is proved, and that they have not the quality of a public record.
>
> We agree with that court in thinking that, in no point of view, on the evidence adduced in this case, can effect be given to these registers of squares as contradicting or overriding the plans of the city adopted by the President, wherein, as we have seen, the squares in question were bounded by streets interposed between them and the channels of the river. [*Morris* v. *United States*, 174 U.S. at 276–77.]

We agree with the decision of the Court in that case on this point and reject this evidence for the same reason.

The plaintiffs argue that the purchasers of the original lots acquired title to portions of the alleys and that they are their successors in title. Neither proposition has been proved. There is no evidence that the original purchasers of the lots received a conveyance of any portion of the alleys, nor is there any proof showing a chain of title to the alleys from such purchasers to the plaintiffs. Plaintiffs' contentions amount to no more than general allegations without proof. The plaintiffs have occupied themselves with attacking the title of the United States in the alleys without proving that the plaintiffs themselves have title. In suits to quiet title and in trespass to try title, there is a well-established rule that a plaintiff can recover only on the strength of his own title

and not on the weakness of defendant's title. *See* 87 C.J.S. *Trespass To Try Title* § 17 (1954) at 1131; *Shapleigh* v. *Mier*, 299 U.S. 468 (1937); *Bursey* v. *Lyon*, 30 App. D.C. 597 (1908); and *Kirby Lumber Corp.* v. *Cain*, 255 F. 2d 72 (5th Cir. 1958). Many other cases could be cited. *See also*, 74 C.J.S. *Quieting Title* §§ 17, 76 (1951) at 41–42 and 119 and cases cited in footnote 58 at 41. While the present suits do not fall in either of those categories, the above principle should apply here, because the plaintiffs could not recover in any event unless they have fee simple title to the street and alleys. This they have not proved.

The plaintiffs also contend that when the lots abutting on the street and alleys were sold, the street and alleys passed to the purchasers as appurtenances to the abutting lots. It is well settled that land cannot be appurtenant to land. This principle was well stated by the Supreme Court in *Harris* v. *Elliott*, 35 U.S. (10 Pet.) 25 (1836). In that case the United States bought several lots for a navy yard. The lots were bounded by certain streets. One of the lots was described by metes and bounds (not including the streets), "*with appurtenances.*" The United States fenced in the streets as a part of the navy yard, claiming that they passed to the United States as appurtenances to the abutting lots. The Court held against the Government saying:

> * * * This term, [appurtenance] both in common parlance and in legal acceptation, is used to signify something appertaining to another thing as principal, and which passes as an incident to the principal thing. Lord Coke says (Co. Litt. 121*b*), a thing corporeal cannot properly be appurtenant to a thing corporeal, nor a thing incorporeal to a thing incorporeal. According to this rule, *land cannot be appurtenant to land.* In the case of *Jackson* v. *Hathaway* (15 Johns, 454), the court say, it is impossible to protect the defendant, on the ground that the adjoining road passed by the deed, as an incident to the lands professedly granted. A mere easement may, without express words, pass as an incident to the principal object of the grant; but it would be absurd, to allow the fee of one piece of land, not mentioned in the deed, to pass as appurtenant to another distinct parcel, which is expressly granted by precise and definite boundaries. And in the case of *Leonard* v. *White* (7 Mass. 6), it was decided, that by the grant of a grist-mill, with

> the appurtenances, the soil of a way, immemorially used for the purpose of access to the mill, did not pass; although it might be considered as a grant of the easement, for the accommodation of the mill. (Cro. Eliz. 704; Cro. Car. 57; 3 Salk 40.) The answer, therefore, to this branch of the question, must be, that *the soil and freehold of the streets did not pass, under and by virtue of the term "appurtenances,"* * * *. [Emphasis supplied.] [Id. at 54.]

Another argument of the plaintiffs is that even if the United States had title to the alleys when the commissioners sold all of the abutting lots in a square, the United States gave up or lost its title to the alley. We do not agree. This identical question was decided by the Supreme Court of Texas in *Town of Refugio* v. *Strauch*, 29 S.W. 2d 1041 (1930). In that case the town of Refugio received a grant of four leagues of land from Mexico about the year 1834, which was later recognized by the Republic of Texas and thereafter by the State of Texas. The grant was in the form of a square with the town in the center. Lots and streets were laid out. The land in controversy was a street bounded on both sides by 40 acre farm lots. The town sold all these farm lots and the purchasers put a fence around them and the street. The fence was in place for 40 years. Oil and gas was discovered in the area and the street became valuable property. A lawsuit ensued between the town and the purchasers of the abutting lots, each claiming title to the street. The purchasers claimed that their title went to the middle of the street. The court held against them saying:

> * * * The rule is recognized in this state that, when a private individual, as the owner of a lot in a town or city, fronting on a street, conveys a lot, it is presumed that the intent of the grantor was to extend the grant to the middle of the street. This presumption arises out of the necessity of the case, as well as by reason of the fact that the owner of the fee to the street had dedicated the street to public use, but had reserved the fee in himself, subject to the acceptance by the public of the street dedicated. *This presumption, however, does not exist under the facts of this case, since the town of Refugio, a municipality, owns the fee in the land, and has owned it at all times since the sovereign parted with the title. In such a case the presumption is that the grantor intended to keep, and the grantee understood that the grantor was keeping,*

the fee-simple title. A presumption cannot arise where the facts themselves are of contrary import. 4 R.C.L. p. 80, 87; *Harding* v. *Jordan*, 140 U.S. 371, 397, 398, 11 S.Ct. 838, 35 L.Ed. 428; *Smith* v. *Slocomb*, 9 Gray (Mass.) 36, 69 Am. Dec. 274; *Lembeck* v. *Nye*, 47 Ohio St. 336, 24 N.E. 686, 8 L.R.A. 578, 581, 21 Am. St. Rep. 828; *Perry* v. *Board of Com'rs of Caddo Lefee Dist.*, 132 La. 415, 61 So. 511, 514; note in 30 Am. St. Rep. 853, and in 39 Am. St. Rep. 154.

In Ruling Case Law, p. 80, it is said: "The presumption primarily applies to conveyances by individuals. *If a municipal corporation having title to the fee to a street conveys land as bounded on it, the title of the grantee does not impliedly extend to the middle, but is limited to the line of the street, because the legal intendment in such case is that it is to remain a public highway.*" In 9 C.J. p. 204, it is said: "A conveyance by a city of land bounded by a street of which it is the owner in fee, the title thereto being held in trust for street purposes, does not carry title to the center of the street, there being no presumption as in case of conveyances by individuals that a conveyance of land bounded on a street carries title to the center of the street." In *Graham* v. *Stern*, 168 N.Y. 517, 61 N.E. 891, 893, 85 Am. St. Rep. 694, it is said: "There is an obvious and a material distinction between the case of a conveyance by an individual of lands bounded upon or by a street and that of a similar conveyance by municipal authorities. The presumption that obtains ordinarily in the one case * * * should be regarded as offset in the other by another presumption,—that the municipality would not part with the ownership and control of a public street once vested in it for the public benefit. * * * It is altogether the sounder proposition * * * that the grant of title to property bounded by or upon a city street, derived from the public authorities, in the absence of any more definite description, carries only to the line of the street." [Emphasis supplied.] [*Id.* at 1045.]

This brings us to the argument of the plaintiffs that the original alleys in Washington were established under the common law by which the title of the owners of the abutting lots extended to the center of the alleys subject to an easement in favor of the United States and that upon their closing the title reverted to the abutting lot owners. This is a correct statement of the common law rule. *See People* v. *City of Chi-*

cago, 152 N.E. 141 (Sup. Ct. 1926) where this principle is stated as follows:

> At common law the dedication of a street or alley passed to the municipality merely an easement. The dedicator still continued to own the fee, subject to the easement. A deed of an abutting lot passed the title to the center of the street or included the entire street, as the case might be, burdened, of course, with the easement. If the street was abandoned or vacated by the municipality the abutting owner continued to hold his title to the center of the street just as he had held it before, but now freed from the easement. * * * [*Id.* at 144.]

We do not agree that the original alleys in this case were dedicated at common law. When Maryland ceded the land to the United States and the proprietors had conveyed the land in fee simple to the trustees, the sovereignty of Maryland over the land ceased and that of the United States attached. The common law no longer controlled or even applied to the establishment of the alleys. The rule announced in the *Town of Refugio* case and the authorities therein cited is the correct one, namely, that where the city has title to the streets and alleys, the title of the owners of the abutting lots extends only to the line of the streets and alleys and not to the center thereof. In the *Van Ness* case, the Supreme Court at 684 distinguished between the laying out of the original streets in Washington and the common law dedication in *Railroad Company* v. *Schurmeir*, 74 U.S. (7 Wall.) 272 (1868). The United States (in the instant cases) continued to own the fee in the street and alleys to the dates of their closings.

The plaintiffs argue that this is inconsistent with the provision of the statute cited below that allows the owner or owners of an *entire square* to replat the square and rearrange the alley. The plaintiffs say this could not be done if the United States owns the fee in the alley. We do not agree. Congress has taken care of this situation by requiring the replatting of the square and the new alley and requiring the new plat to be submitted to and approved by the city council, and thereafter recorded. Under these circumstances, the original alley is replaced by a new alley with the approval of the United States and "the *proprietary interest of the United States* shall forever cease and determine and the title

to the same shall be vested according to the agreement of the owners as shown in the aforesaid plat * * *." (D.C. Code § 7-307). Thereafter the United States is estopped to assert ownership of the original alley in the square. In the cases before us, the plaintiffs are not the owners of entire squares. They own only a few of the lots in the squares. For instance, the plaintiff Metropolitan Club of the City of Washington owns only two lots out of square 166 which originally contained 27 lots.

The case of *Pratt* v. *Law*, 13 U.S. (9 Cranch) 456 (1815) is very much in point here and is dispositive against the plaintiffs' claim of fee simple title to the alleys in the present cases. In that case, plaintiff Law contracted to purchase 2,400,000 square feet in the Federal City of Washington. His vendors attempted to charge him for square footage in alleys in squares in which the entire squares were not conveyed to him. Law refused to pay for the square footage in the alleys and the matter was taken to court. The Supreme Court agreed with Law, saying:

> * * * If this claim of Law's extended to the alleys in those squares of which the whole was conveyed to him, there would be some ground for disputing it. But as it is confined to those squares only in which the right could not be merged, because some one or more of the lots were the property of another, we think the allowance ought to be made; *for Law certainly has not acquired a title in fee simple in those alleys.* [Emphasis supplied.] [*Id.* at 490.]

The plaintiffs in the instant cases are in the same situation that Law was in as far as title to the alleys is concerned, because they own only a few lots in their respective squares, and in the language of the Supreme Court they "certainly have not acquired a title in fee simple in those alleys."

Mention should be made of the case of *Bursey* v. *Lyon*, 30 App. D.C. 597 (1908). In that case the Supreme Court of the District of Columbia held, with reference to the title of the United States in the streets and alleys in the Federal City of Washington:

> * * * The foundation of the government's *title to so much of the real estate as was ultimately dedicated to streets, alleys*, or public grounds rested upon contract

with the individual proprietors. *As to this portion of the ceded territory, title in the soil became vested in fee simple in the United States.* * * * [Emphasis supplied.] [*Id.* at 605.]

The court held further:

> At this point it is proper to consider whether the legal title to the land here in controversy ever passed to the United States. *The streets, alleys*, and lands selected by the President for public purposes, for which the grantors were to be paid at the rate of twenty-five pounds per acre, by the terms of the deeds of trust and the agreement *became vested in the United States in fee simple*, as soon as the same were selected, set apart, and apportioned by the commissioners. As to the lands so embraced, the executory agreement, and the deed of trust made in pursuance thereof, were no longer executory, but became final and complete. * * * [Emphasis supplied.] [*Id.* at 607–08.].

We have a clear-cut holding by the court in that case that the title to the streets and alleys vested in fee simple in the United States. We are in total agreement with such decision by that court.

We held in *Calvin-Humphrey Corp.* v. *United States*, 202 Ct. Cl. 519, 480 F. 2d 1323 (1973), that the title to an original alley closed in that case was in the United States. Of course, in that case all parties assumed this to be true and no one raised any question as to the title of the United States in the alley. This was in keeping with the understanding and belief of the general public and of the Congress since 1791.

It is significant that the court in *Carr* v. *District of Columbia*, 371 F. Supp. 293 (D.D.C. 1974), *aff'd and remanded for modification* (September 3, 1975, without opinion), 521 F. 2d 324 (D.C. Cir. 1975), (a slip opinion was filed August 18, 1976,) in considering the closing of an original alley in Washington, D.C., repeatedly characterized it as property of the United States. For instance, it stated:

> * * * The entire portion of the alley space to be closed was an original alley *owned by the United States.*
>
> * * * * * *
>
> * * * [P]laintiffs were ordered to pay to the Treasury of the United States the sum of $196,200.00 representing the fair market value of *the United States property to be closed.* * * * [Emphasis supplied.] [*Id.* at 295.]

In the conclusions of law the court held:

> The District of Columbia City Council and its members are authorized to close *United States alleys* in the District of Columbia * * *.
>
> Any money received by the District of Columbia for the sale of closed alley space *owned by the United States* must be deposited by the District in the United States Treasury * * *.
>
> * * * * * *
>
> * * * Congress has delegated to the District of Columbia complete authority to close *United States alleys.* [Emphasis supplied.] [*Id.* at 296.]
>
> * * * * *
>
> When the District of Columbia pursuant to D.C. Code § 7–401, * * *, determines that a *United States alley* is useless and unnecessary and decides to close it, *title to the alley does not automatically revert to the owners of the property abutting the area to be closed.* * * *
>
> * * * * *
>
> When closing *original United States* property * * * the District of Columbia City Council may, for the account of the United States, charge abutting property owners the fair market value of the space closed. Section 7–401 *distinguishes between United States and District of Columbia land* and gives the City Council express authority to charge for *United States property.* * * * Because this case involves *an original United States alley* * * *. [Emphasis supplied.] [*Id.* at 297.]

The D.C. Circuit Court of Appeals affirmed the findings of fact and conclusions of law in 521 F. 2d 324, and in its slip opinion of August 18, 1976. The foregoing cases support our conclusion that the fee simple title in the original street and alleys was vested in the United States at the time of the closings involved in this case.

The Congress in enacting various laws through the years for the closing, straightening, widening, sale, etc. of alleys in the city of Washington, has recognized and carefully preserved the difference between alleys owned in fee simple by the United States and common law alleys dedicated by developers or abutting property owners which are owned by the District of Columbia. This distinction was pointed out by the court in *Carr* v. *District of Columbia*, 371 F. Supp. 293, 297 quoted above. In describing the alleys owned by the United

States in these laws, the Congress sometimes referred to them as "original alleys, the fee of which is in the United States," (the Act of 1892, §§ 1, 3; the Act of 1901, §§ 1608, 1610) and sometimes described them simply as "original alleys," (the Act of 1905, §§ 1608a, 1608b and D.C. Code §§ 7–302, 7–303). We conclude that these terms are used interchangeably and have the same meaning, and that when Congress referred to or described an alley as an "original alley" in the various laws dealing with the closing and sale of alleys (including the various sections of the present D.C. Code) it was the intent and purpose of Congress to refer to and describe alleys that were originally laid out in the city of Washington in which the fee simple title was vested in the United States. The parties in the instant cases have agreed that the alleys involved here are "original alleys."

The various laws passed by the Congress dealing with the closing, sale, etc., of alleys in the city of Washington, as listed by the plaintiffs, are the following.

By Act of January 12, 1809, 2 Stat. 511, Ch. VIII, Congress authorized the proprietors of squares and lots in the city of Washington to subdivide squares or lots, and alleys, into "building lots pieces or portions for sale and occupancy." Such authorization included the right to relocate "ways, alleys, or passages." The same Act authorized the President of the United States to subdivide squares or lots belonging to the United States, "which may not have been reserved for public purchase," into "lots, pieces or portions for sale and occupancy and alleys for their accommodation." The provisions of this Act of 1809 are contained substantially in the subsequent Act of March 3, 1901, 31 Stat. 1426, Ch. 854 as set forth in Section 1–612, *et seq.* D.C. Code (1973). *See United States ex rel Case* v. *Forsyth*, 5 Mackey 483 (1887). In 1848 (9 Stat. 223, Sec. 3, 30th Congress, 1st Sess. 1, Chapter 42), Congress added a new provision permitting the corporation of Washington "to cause new alleys to be opened into squares, and to open, change or close those already laid out, upon the application of the owners of more than one-half of the property in such squares * * *." *See Webb's Digest* 1 (1868).

By Act of July 6, 1882 (22 Stat. 151, 47th Cong. 1st Sess. Ch. 271–273), Congress authorized the closing of alleys upon

petition of the owners of an entire square or owners of a part of a square bounded on all sides by public streets if those owners offered to the commissioners of the District of Columbia in the petition to dedicate for public use an amount of ground at least equal to the area of the alleyway sought to be closed. This section is essentially the same as the provisions now contained in § 7–306, D.C. Code (1973).

Congress, in 1892 (27 Stat. 255, 52d Cong., Sess. 1, Sec. 1) authorized the commissioners to:

> * * * [C]ondemn, open, extend, widen or straighten alleys in the District of Columbia * * * [upon] petition of the owners of more than one-half of the real estate in the square * * * or when the Commissioners * * * shall certify that the preservation of peace, good order and public morals require that any such alley should be opened, extended, widened or straightened; or when the health officer of the District shall certify that the opening, extension, widening or straightening of an alley is necessary for public health * * *.

The first portion of Section 1 of the Act of July 22, 1892, is essentially the same as the provision now contained in § 7–301 dealing with the condemnation for alleys and minor streets. Under the second portion of Section 1 and companion Section 3 of that Act (which is essentially the same as § 7–302 D.C. Code (1973)), Congress provided that, if in the opening, extension, widening or straightening of an alley by condemnation as provided in Section 1 of the Act, the commissioners had authority to close any "*original alley*" or part of such alley rendered,

> * * * [U]seless or unnecessary, the fee to which is in the United States, by entering into an agreement with the owners of the lots or parts of lots contiguous thereto for the purchase by them of the land contained in said alley sought to be closed, at a price to be agreed upon * * * which price shall not be less per square foot than the assessed value per square foot of the contiguous lots * * *.

Also in Section 3, Congress provided that the commissioners could sell and convey such land, *the fee to which is in the United States*, in the alley to be closed for cash to any person or persons. The commissioners were also authorized, in connection with the condemnation for alleys, "to close an

alley, or part of an alley, *the fee to which is not in the United States*," upon petition of the owners of all lots or parts of the lots abutting thereon. Section 9 of the Act provided that, "If any monies from the sale of land in which the United States is interested shall remain after carrying out the provisions of the Act, the money shall be paid into the Treasury of the United States by the Commissioners of the District of Columbia."

In 1901, Congress consolidated and added provisions pertaining to the opening, closing and rearrangement of alleys within the District of Columbia. 31 Stat. 1426, 57th Cong. 2d Sess., Ch. 854, March 3, 1901. In §§ 1605 and 1606, Congress reenacted the provisions concerning the closing of alleys whenever all the owners of an entire square or all the owners of part of a square bounded on all sides by public streets petitioned the District of Columbia for closing (see § 7–306 and § 7–307, D.C. Code (1973)). Section 1607 of the same Act provided for the obliteration of subdivisions and alleys on petition of the owner of an entire square where the owner or owners desire to improve the square by the erection of a building covering not less than two-thirds of the area thereof for the purpose of some business enterprise. This subsection is now embodied in § 7–308, D.C. Code (1973). The first part of Section 1608 is essentially the same as the 1892 Act, except that it also provided for opening, extension, widening and straightening minor streets and provided for the closing of alleys the width of which is less than 10 feet. The second portion of Section 1608 provided for the sale of the alley areas closed in connection with the opening and extension *if the fee title to the land* or part thereof was in the United States. The section with regard to alleys less than 10 feet in width is now contained in § 7–304, D.C. Code (1973). Section 1610 also restates the provisions of the Act of 1892 with regard to closing of alleys *not titled in the United States* rendered useless or unnecessary by the opening, extension, widening or straightening of an alley or minor street as provided in the Act.

By Act of 1905 (58th Cong., Sess. 3, Ch. 734, 33 Stat. 733) Congress again amended the Code of Laws for the District of Columbia and consolidated and added provisions concern-

ing the opening and closing of alleys. These provisions have remained substantially unchanged to date. Sections 1608 and 1608(a) were essentially the same, except that the qualifying words "*the fee of which is in the United States*" *contained in the Act of 1892 and Act of 1901 were omitted after or replaced by the words* "*original alleys.*" These two companion provisions relating to condemnation for alleys and minor streets now comprise § 7–301 and § 7–302, D.C. Code (1973).

Section 1608(b) relating to closing alleys upon dedication of others, was added for the first time by the Act of 1905. This provision is the same as § 7–303 D.C. Code. Under Section 1608(b), the commissioners were authorized *for the first time* to accept the *dedication* of an alley or alleys and, in connection therewith, to close any existing alley or alleys in the square in which the dedication is made upon the application of the *owners of all the property abutting upon such existing alley or alleys.* If the alley were an "*original alley,*" the parties were to enter into a mutual agreement in writing under seal as to the disposition of the ownership of the land contained in the alleys. Upon recordation of the required plats, the *original alley* or portions thereof vested in the parties whose names appeared on the plat.

The other provisions of the 1905 Act incorporated previous Acts of Congress. For example, Section 1608(c) incorporated the provisions of the 1901 Act relating to alleys less than 10 feet in width and Section 1608(d) incorporated the provisions of the 1901 Act concerning the closing of alleys in squares owned by one person or partners where there was a desire to construct a building covering not less than two-thirds of the area thereof. Section 1611 (the same as § 7–325, D.C. Code (1973)) provided that "All money derived from the sale of land in which the United States is interested, under the provisions of this Act, shall be paid into the Treasury of the United States by the Commissioners of the District of Columbia to the credit of the United States."

On December 15, 1932, Congress adopted the Street Readjustment Act (47 Stat. 747, Ch. 4 § 1 *et seq*) which provided for the closing of streets, roads, highways or alleys or parts thereof in the District of Columbia, or the sale thereof under § 7–302, when, in the judgment of the commissioners,

the street, road, highway or alley or part thereof, is rendered "useless or unnecessary" upon certain conditions. See, § 7–401, *et seq.*, D.C. Code (1973). As indicated in the Street Readjustment Act (§ 7–409), the provisions of the Act *were in addition* to the laws already in existence which provided for the closing of streets, roads, highways or alleys. It provided in § 7–409 that all existing laws authorizing the closing of streets, roads, highways, or alleys were to remain in full force and effect.

At the times the alleys and the street were closed in these cases, the council was authorized to close them under Sections 7–302, 7–303, 7–304, 7–305, 7–306, 7–308, and 7–309 of Title VII, Chapter 3, *Alleys and Minor Streets*, D.C. Code (1973), and Sections 7–401 through 7–410 of Chapter 4, *Closing Streets, Alleys, or Highways* (The Street Readjustment Act of 1932). The alleys that were closed upon the applications of plaintiffs Washington Medical Center, Inc., and The Metropolitan Club of the City of Washington were closed by resolutions of the council that recited that they were being closed pursuant to Section 7–303, as both plaintiffs were dedicating small areas for new alley spaces in addition to requesting portions of the original alleys to be closed under § 7–303, D.C. Code, which provides as follows:

> § 7–303. Alleys may be closed on dedication of new ones—Application of property owners—Future ownership of closed alleys—Plats recorded
>
> The said commissioners are authorized to accept the dedication of an alley or alleys and in connection therewith to close any existing alley or alleys in the square or block in which such dedication is made upon the application of the owners of all the property abutting on such existing alley or alleys. *If the alley proposed to be closed is an original alley*, the party or parties making the dedication and the parties applying for the closing of the alley or alleys shall present with such application a mutual agreement in writing and under seal, in duplicate, as to the future ownership of the land contained in the alley or alleys to be closed, together with two plats showing the alley or alleys divided into parcels, with the name of the future owner marked on each parcel, in accordance with such agreement. Copies of the order of the commissioners accepting the dedication and closing the original or subdivisional alley, together

with the said agreements and plats in the case of an original alley, shall be forwarded by said commissioners to the surveyor and recorder of deeds of the District of Columbia for record and thereafter the title to the land in such subdivisional alley shall revert to the owners of the land abutting thereon, and the title to the land in the original alley shall vest in the parties whose names appear on said plat in accordance with said agreement. Mar. 3, 1901, ch. 854, § 1608b, as added Feb. 23, 1905, ch. 734, 33 Stat. 733. [Emphasis supplied.]

The plaintiffs argue that Section 7–303 nowhere provides for the charging of money or assessment against the plaintiffs for the closing of the alleys, and therefore, the money exacted from them by the council for such closings was done without authority and was accordingly illegal. They contend further that Section 7–302, which does authorize the collection of money by the council for closing original alleys, cannot be looked to nor relied on to sustain the action of the council, because Section 7–303 does not refer to Section 7–302, and the sections of the Code are separate and mutually exclusive of each other and cannot be considered together. We do not agree. This identical point was decided by us adverse to the plaintiffs' position in our opinion in *Calvin-Humphrey Corp.* v. *United States*, *supra*, where we held:

> * * * It appears that although the Council only referred to section 303 in its resolution closing the alley and accepting the dedication of the new alley, *it was proceeding at the same time under all the other provisions of the Code which authorized it to collect money for the United States for the closing of an "original" alley, the title to which was in the United States.* That is what was done in this case and the money was paid into the Treasury of the Government. This appears to be in full conformance and compliance with the provisions of the various sections of the Code mentioned above. [Emphasis supplied.] [202 Ct. Cl. at 524, 480 F. 2d at 1325.]

In *Carr* v. *District of Columbia*, 371 F. Supp. 293, 297, *supra*, the court made a similar ruling in construing Section 7–401, saying:

> The options afforded the District of Columbia by Section 7–401 in dealing with United States property *are not mutually exclusive.* [Emphasis supplied.]

Even in the first *Carr* case (*Carr* v. *District of Columbia* 312 F. Supp. 283 (D.D.C. 1970)) relied on heavily by the plaintiffs in this case, although it involves the closing of a non-original alley and is inapposite here on the merits, (as it was in the *Calvin-Humphrey* case), Judge John J. Sirica stated in construing Section 7-401, D.C. Code:

> * * * When *all* of the relevant sections of the statute *are read* together it appears that the intention of Congress in enacting the statute was that * * *. [Emphasis supplied.] [*Id.* at 285.]

The fact that the council in the instant cases referred to Section 7-303 did not prevent it from requiring the payment of money for the alley closings under Section 7-302 which provides:

> § 7-302. Useless alleys—Sale of original alleys—Reversion of title to owner
>
> If in the opening, extension, widening, or straightening of an alley or minor street, or in the extension or widening of public streets or highways, an alley or part of an alley may have been, or may hereafter be, in the judgment of the said commissioners rendered useless or unnecessary, said commissioners are authorized to close the same. *If the alley to be closed is an original alley, they may sell the land contained therein for cash at a price not less than the assessed value of contiguous lots.* If the alley is not an original alley, the title thereto shall revert to the owners of the land abutting thereon, but all such land shall be subject to the assessment for benefits hereinafter referred to. Mar. 3, 1901 ch. 854, § 1608a, as added Feb. 23, 1905, ch. 734, 33 Stat. 734. [Emphasis supplied.]

It should be pointed out that Section 7-304 refers to Section 7-302 as follows:

> § 7-304. Closing narrow alleys—Application of property owners—Disposal of land
>
> The commissioners are authorized to close any alley or part of alley the width of which is less than ten feet upon the application in writing of the owners of all the abutting property. *If the title to such closed alley is in the United States, the land shall be sold, as provided in section 7-302;* and if the title is not in the United States, the land shall revert as provided in said section. Mar. 3, 1901, ch. 854, § 1608c, as added Feb. 23, 1905, ch. 734, 33 Stat. 734. [Emphasis supplied.]

Also, Section 7–401 in listing the various options available to the council in disposing of closed original alleys, provides:

> * * * [O]r also said property be sold as provided in section 7–302 this title, * * *.

Finally, Section 7–325 provides:

> § 7–325. Proceeds of sale of lands paid into Treasury.
>
> All money derived from the sale of land in which the United States is interested, under the provisions of sections 7–301 to 7–308, 7–313 to 7–318, 7–320, 7–321, 7–323, 7–325 to 7–330 shall be paid into the treasury of the United States by the commissioners of the District of Columbia to the credit of the United States.

It is clear from these various sections of the D.C. Code that refer to each other, and especially Section 7–325 above which refers to all of the principal sections involved in these cases, except Section 7–401 (which itself refers to Section 7–302), that Congress intended that all of these sections must be considered together and in the conjunctive and not disjunctive as plaintiffs contend.

Accordingly, we hold that all of the sections of the D.C. Code listed above must be considered together and in conjunction with each other, and that they are not mutually exclusive. The authority and power granted in one section extends to and applies to each of the other sections.

The council closed the street and alleys described in the petitions of the plaintiffs 1776 K Street Associates, D. F. Antonelli, Jr., and Jack Kogok, under Sections 7–401, *et seq.* of the D.C. Code. Section 7–401 is as follows:

> § 7–401. Street Readjustment—Closing of unnecessary public ways authorized—Disposition of property—Reference to Planning Commission
>
> The Commissioners of the District of Columbia are authorized to close any street, road, highway, or alley, or any part of any street, road, highway, or alley, in the District of Columbia when, in the judgment of said commissioners, such street, road, highway, or alley, or such part of a street, road, highway, or alley, has been rendered useless or unnecessary, the title to the land embraced within the public space so closed to revert to the owners of the abutting property subject to such compensation therefor in money, land or structures as the

commissioners of the District of Columbia, in their judgment, may find just and equitable, in view of all the circumstances of the case affecting near-by property of abutters and/or nonabutters: *Provided, That if the title to such land be in the United States the property shall not revert to the owners of the abutting property* but may be disposed of by the said commissioners to the best advantage of the locality and the properties therein and thereby affected, which properties thenceforth shall become assessable on the books of the tax assessor of the District of Columbia in all respects as other private property in the District; *or also said property be sold as provided in section 7–302 this title*, unless the use of such land is requested by some other department, bureau, or commission of the government of the United States for purposes not otherwise inconsistent with the proper development of the District of Columbia: *Provided further*, That the said closing by said commissioners is made expedient or advisable by reason of change in the highway plan or by reason of provision for access or better access to the abutting or nearby property and the convenience of the public by other street, road, highway, or alley facilities, or by reason of the acquisition by the District of Columbia or by the United States of America for school, park, playground, or other public purposes, of all the property abutting on the street, road, highway, or alley, or part of a street, road, highway, or alley, proposed to be closed or for other public reasons: *And provided further*, That the proposed closing of any street, road, highway, or alley, or any parts thereof, as provided for in this chapter shall be referred to the National Capital Planning Commission for its recommendation. Dec. 15, 1932, ch. 4, § 1, 47 Stat. 747. [Emphasis supplied.]

These three plaintiffs say that the council closed the street and alleys under this section of the Code for "the best advantage of the locality" and argue that it did not have the authority at the same time to collect money for the closings notwithstanding the fact that Section 7–401 specifically states that the property may be "sold as provided in section 7–302," which authorizes the council to require the payment of money when streets or alleys owned by the United States are closed or sold. The plaintiffs contend that these provisions are mutually exclusive. These arguments are without merit. We rejected them in the foregoing paragraphs and we reject them

again here. The court's decision in the second *Carr* case (371 F. Supp. 293, 297) ruled against plaintiffs' theory in construing this identical section by holding, as pointed out above, that the options in Section 7–401 are "not mutually exclusive." Our holding in the *Calvin-Humphrey* case is to the same effect. Also, as pointed out above, in the first *Carr* case (312 F. Supp. 283) Judge Sirica, in construing the Street Readjustment Act, of which Section 7–401 is a part, held that all of the relevant sections of the statute should be read together.

These three plaintiffs, along with the other two, urge the proposition that the decision in the first *Carr* case (312 F. Supp. 283) that the council could not charge for closing non-original alleys owned by the District of Columbia should also be applied to the closing of the original street and the original alleys in the instant cases in which the fee simple title is vested in the United States. We rejected this contention in *Calvin-Humphrey* and we reject it again here. The law with respect to the closing of a common law dedicated non-original street or alley is not applicable to the closing of original streets and alleys owned by the United States.

All of the plaintiffs say that even if the United States owned the fee in the street and alleys, it only had a nominal value and that the findings of the council of the fair market value of the streets and alleys closed and sold under Section 7–302 were far in excess of nominal value and therefore the collection of the respective sums from the plaintiffs was illegal. The short answer to this argument is that the street and alleys were owned by the United States, who did not have to close or sell them. As Government property, it could be sold for whatever price the Congress authorized. In Section 7–302 the Congress fixed the selling price of original streets and alleys "at a price not less than the assessed value of contiguous lots." The council determined these values in accordance with this directive, the plaintiffs agreed to them and willingly paid the amounts found by the council to be due, and without protest of any kind to the council. It is too late for the plaintiffs to protest these values for the first time in this court. *See United States* v. *Tucker Truck Lines, Inc.*, 344 U.S. 33, 36–37 (1952); *McClung* v. *Thompson*, 401 F. 2d 253, 257 (8th Cir. 1968); and *California Interstate Telephone*

Co. v. *Federal Communications Commission*, 328 F. 2d 556, 559 (D.C. Cir. 1964). It is hardly possible that the council erred in determining the assessed value of the contiguous lots, as these values are a matter of public record. But even if there were errors, the plaintiffs should have complained about them to the council at the time the errors were made. We cannot consider errors not brought to the attention of the council. Besides, the plaintiffs have not shown any errors made by the council as to the assessed values of the contiguous lots, or the application thereof to the street and alleys involved here, in any of their pleadings, briefs, or other papers filed in this court.

We reject plaintiffs nominal value theory. To support this theory, they say (1) that the United States only had easements and not title, and (2) the rule as to value in condemnation cases should be applied here. They cite *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913); and *Fitzhugh* v. *United States*, 40 F. 2d 797 (D.C. Cir. 1930), in support of their second argument. These are condemnation cases. We do not agree with either of plaintiffs' propositions. We have already held that the United States had fee simple title to the street and alleys and not mere easements. The rule as to value in condemnation cases does not apply to the sale of original streets and alleys in which the fee simple title is vested in the United States and the Congress has fixed the selling price by statute, which is the situation in the instant cases. Consequently, the cited condemnation cases are inapposite.

The plaintiffs say that prior to 1967 the council did not require the payment of money for the closing of non-original or original alleys in the city of Washington and the sale thereof to abutting property owners, but in that year it started charging for such closings and sales. The plaintiffs complain that this was done without notice to the public and that their due process rights were violated. The plaintiffs are in no position to make such an argument. Each of them had full notice from the council that money was required to be paid for the closings and the amount to be paid. After receiving this notice, each plaintiff agreed to pay the amount required by the council and paid it voluntarily with full notice

and knowledge as to the charges being made. Nothing was taken from the plaintiffs in violation of due process, as all of the transactions were completed by agreements of the plaintiffs with the council. Furthermore, no objections were made by plaintiffs to the council as to the lack of public notice at the time the charges were made, and we cannot consider them at this late date.

Finally, the plaintiffs Antonelli and Kogok allege in their petitions that the D.C. Administrative Procedure Act became effective on October 21, 1969, and that Section 1–1507, D.C. Code (1973) required the council to compile rules and regulations for the closing of streets and alleys and that this had not been done. No proof was offered of these facts. The petition of plaintiff 1776 K Street Associates does not contain any such allegation, but in its brief it makes the same argument. The closings of the street and alleys for these three plaintiffs were made by the council after the effective date of the D.C. Administrative Procedure Act. None of these plaintiffs show how the failure of the council to compile such rules and regulations, if the council so failed, affected their claims or rights in the instant case. They simply say that the failure of the council to compile such rules and regulations was a violation of the Administrative Procedure Act. Even if the council did violate the Act in this regard, which was not proven, such violation is of no help to these plaintiffs without allegations and proof on their part that such a violation denied them a right to which they were entitled under the law. The record is totally lacking as to any such allegations or proof. Under these circumstances, we regard this contention of these plaintiffs to be irrelevant and immaterial to any issue in their cases. Furthermore, even if the council was required to compile such rules and regulations by the Administrative Procedure Act and failed to so do, such failure could not have the effect of overruling and rendering a statute enacted by Congress unenforceable. Section 7–302 of the Act of Congress described above specifically authorized original streets and alleys to be closed and sold and charges made therefor. The mere failure of the council to compile rules under the Administrative Procedure Act could not change

Syllabus

nor supersede this statute. We conclude that this argument of these plaintiffs is without merit.

We hold that the United States had fee simple title to original G Street, N.W., and to the original alleys involved in these cases, portions of which were closed and sold by the D.C. Council as agent of the United States to the respective plaintiffs, and that the council was fully authorized by statutes enacted by Congress to make such closings and sales and to charge and collect the amount of the fair market value thereof, as determined by the council, from the plaintiffs in accordance with the statutes, and that by reasons thereof the plaintiffs are not entitled to recover.

Accordingly, the joint motion for summary judgment of the plaintiffs is denied, the motion and cross-motions for summary judgment of the defendant are granted, and plaintiffs' petitions are dismissed.

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543 F.2d 1284

HARVEY PASCAL v. THE UNITED STATES

[No. 379–74. Decided October 20, 1976]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Civilian pay; dismissal; falsification of time reports; unauthorized absence from duty station; penalty.—Plaintiff, a former agent (GS–12) in the Audit Division, Office of International Operations, Internal Revenue Service, was removed from his position on six charges which concerned plaintiff's official trip to Toronto, Canada. The Civil Service Commission sustained four of the charges; however, the court considers only two in this suit to recover back pay and for restoration to his position. The two charges are: (1) that plaintiff intentionally submitted false time reports respecting certain specified days and falsely and deliberately included those times during which he was actually not working in Toronto in his certification for *per diem* payments, and (2) that he failed to obtain advance authorization to be absent from this duty station on working days. Plaintiff visited his girl friend in New York during the relevant days. In is *held* that the conclusions of the agency and the Commission as to the lack of credibility of plaintiff's story are fully supported by the administrative record, that his procedural objections are not well taken, that neither the agency nor the Commission abused its discretion in imposing the penalty of removal, and

Syllabus

that plaintiff accordingly is not entitled to recover. Plaintiff's motion for summary judgment is denied, defendant's cross-motion is granted, and the petition is dismissed.

Civilian pay; evidence; weight and sufficiency.

[1] In reviewing an administrative decision for substantial evidence, the standard is not what the court would believe on a *de novo* appraisal as to the credibility of plaintiff, but whether the administrative determination is supported by substantial evidence on the record as a whole.

Administrative Law and Procedure ⇐ 791

Civilian pay; regulations of Executive Department; travel on official time.

[2] It is not the principle of the government world that everything is permissible which is not specifically prohibited by regulation or statute. While no regulation expressly forbids a Government employee from making a personal trip on official time, much is left to the common understanding that work-time is for work and those activities directly related to work—not for personal recreation or personal concerns.

Officers ⇐ 66

Civilian pay; adverse personnel action; procedural violation.

[3] Any procedural lapse in a removal process does not automatically give the dismissed employee a right to a judgment and to back pay. In reviewing an administrative record, the court looks to see not only whether an error occurred but whether it substantially affected the employee's rights in the removal process.

Officers ⇐ 76

Duress; resignation; claim of duress.

[4] The remedy of an employee whose resignation stems from duress is to have the Civil Service Commission treat the involuntary resignation as an adverse personnel action. Where an employee was dismissed on sustained charges and reasons and was accorded treatment consonant with an adverse personnel action, he cannot expect to be placed in a better position simply because the alleged coercion failed to result in his resignation.

Officers ⇐ 62

Civilian pay; administrative remedies; failure to exhaust.

[5] In general, a Government employee must exhaust his administrative remedies prior to bringing suit in this court for loss of pay arising from an alleged adverse personnel action. This rule extends to alleged omissions in the pre-charged investigation file which was shown to plaintiff but which he did not adequately assert in his appeal before the Civil Service Commission.

Officers ⇐ 101

Opinion of the Court

Evidence; hearsay, admissibility of; administrative hearings.

[6] Hearsay is admissible in an administrative hearing if sufficiently convincing to a reasonable mind and if it reveals sufficient assurance of its truthfulness.

Administrative Law and Procedure ⟸ 461

Civilian pay; dismissal; charges and reasons for dismissal; penalty v. offense.

[7] A federal employee's deliberate falsification of travel, work and *per diem* records in an effort to obtain a distinct and substantial advantage from the Government bears on the efficiency of the service and, when proved, warrants separation (if that is an authorized sanction). It is immaterial that others would not have imposed the extreme sanction.

United States ⟸ 36

Michael E. Goldman, for plaintiff; *Robert M. Tobias*, attorney of record.

Stephen G. Anderson, with whom was *Assistant Attorney General Rex E. Lee*, for defendant. *John W. Showalter*, of counsel.

Before LARAMORE, *Senior Judge*, DAVIS, and KUNZIG, Judges.

DAVIS, *Judge*, delivered the opinion of the court:

Plaintiff Harvey Pascal, then an agent (GS–12) in the Audit Division of the Office of International Operations of the Internal Revenue Service, was originally removed by his agency on six different grounds. The Civil Service Commission sustained the result and four of the supporting reasons. We find it necessary to consider only the first two and confine this opinion to those determinations.[1]

After some five years with the Revenue Service in Brooklyn Pascal was transferred to International Operations in Wash-

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[1] All the charges concerned Pascal's trip to Toronto, Canada, to audit the books of the Canada Life Assurance Company. Of the four charges we lay aside, the Commission upheld a count that Pascal had failed to maintain proper dress and grooming while conducting the audit in Toronto and another accusation that he had failed to perform adequate duty hours while on that assignment. Two counts were rejected by the Commission as unproved. One was that he had brought discredit upon the Revenue Service by conducting himself in an unacceptable manner while in Toronto through suggestive behavior with regard to seeking female company; the other was that while in Toronto he failed to exercise reasonable care of government documents.

ington. About five months later he was assigned to conduct a tax audit of the Canada Life Assurance Company in Toronto, Canada. This audit lasted for some time and Thanksgiving Day 1972 came in the midst of it. To visit his girl friend in New York, he flew from Toronto to New York on a flight leaving at 10:20 a.m. on Wednesday, November 22d, and arrived back in Toronto on a return flight at 11:00 a.m. on Monday, November 27th.

The first charge we take up is that he (a) falsely and intentionally stated in his official time reports that he had worked a full day (8 hours) on both Wednesday, November 22d, and Monday, November 27th, (b) had also falsely and intentionally charged the full day of Friday, November 24th, to official time, and (c) had included, likewise falsely and deliberately, those times during which he was actually not working in Toronto in his certification for *per diem* payments. The second, related, charge is that Pascal failed to obtain advance authorization to be absent from his place of duty in Toronto on part of that Wednesday, all of Friday, and part of Monday—which were working days.

The bare, hard, objective facts of these two charges are not and have not been contested; the chief dispute is over the administrative finding—within the agency and at both levels in the Civil Service Commission—that plaintiff knew that his reports were false when he made them and also understood that he had not gotten authorization to take the time off.

Pascal's presentation was and is that prior to leaving Washington for Toronto he arranged with his girl friend (Ms. Josephine Hornstein), who was divorced with young children and lived in New York, to see her during the Thanksgiving weekend; she was to come to Toronto if she could get a babysitter. Pursuant to this plan he says he bought in Toronto on November 8th an airline ticket between Toronto and New York; he says he was then told, on inquiry, that the ticket was good either way so that Ms. Hornstein could use it from New York if she got a babysitter and he could use it from Toronto if she did not. On Tuesday, November 21st, Ms. Hornstein told him that she was unable to obtain help. He thereupon made reservations to fly from Toronto to New York on Wednesday, November 22d. His testimony was that,

though he tried, he could not get accommodations on the 1:15 p.m. or 3:15 p.m. flights (which he said he was told were full) and had to take a reservation on the 10:20 a.m. flight. He testified that he thought he could travel to New York for the holiday weekend on government time (without taking leave of any kind). He added, also, that he had obtained oral authorization from his superior in Washington, over the 'phone, to take Friday off on compensatory leave.

This story is undermined, however, by the expressed disbelief of both the agency and the Civil Service Commission in plaintiff's credibility. Summarizing much of the conflicting evidence,[2] the Commission's Appeals Examining Office con-

[2] The following is an excerpt from the opinion of the Commission's Appeals Examining Office:

"Mr. Pascal has stated that his girl friend had planned to fly from New York to Toronto, Canada during the Thanksgiving holidays and that a ticket had been purchased from Air Canada for this purpose. Mr. Pascal could not recall whether he had purchased this ticket in Toronto or whether his girl friend had purchased it in New York. He further testified that he did not plan to go to New York until he received a call from his girl friend on Tuesday, November 21, 1972 informing him that she could not find a baby sitter and could not make the trip. He then proceeded to call Air Canada to make reservations for his flight to New York. He states that he was told that the 3:15 p.m. and the 1:15 p.m. flights were filled but that space was available on the 10:20 a.m. flight.

"In an effort to discredit the appellant's testimony, the agency introduced a letter dated June 22, 1973 from Mr. D. Harry McCarl, Sales Manager, Air Canada, addressed to Mr. Stanton Hunter, Office of the Chief Counsel, Internal Revenue Service, wherein he states that Air Canada's records show that ticket 014/420 027 5526 was purchased in favor of Mr. H. Pascal on November 8, 1972 at Toronto International Airport. He further stated that all flights between Toronto and New York on November 22, 1972 were operated with DC-9 equipment having 16 first-class and 78 economy-class seats. The 1:15 p.m. flight to New York carried only 9 first-class and 25 economy-class passengers. The 3:15 p.m. flight carried 3 first-class and 43 economy-class passengers.

"During the hearing Mr. William Schaeffer, Inspector, IRS, testified that Mr. McCarl has informed him that the maximum number of 'no-show' passengers which would be expected on any flight would be three or four. He also stated that ticket #014/420 027 5526 was used by Mr. Pascal on Air Canada flight 774, departing Toronto, Canada at 10:20 a.m. on November 22, 1972 and the return coupon was used by Mr. Pascal to return to Toronto from New York on Air Canada flight 217, arriving in Toronto at approximately 11:00 a.m. on November 27, 1972.

"From all of the above, it is clear that Mr. Pascal's statement that his flight to New York was a last minute decision lacks credibility. Mr. Pascal purchased the ticket for this flight fourteen days in advance of the flight, while in Toronto. If this ticket was purchased with the expectation that Ms. Hornstein, Mr. Pascal's girl friend, was to use it to fly from New York to Toronto. the ticket would have been purchased by her in New York, or at least in her name by Mr. Pascal in Toronto to be picked up at Air Canada's ticket office in New York. If purchased for Ms. Hornstein's use as early as November 8, 1972, Mr. Pascal would surely have mailed her the ticket. When confronted with

(Continued)

cluded that "Mr. Pascal's credibility has been damaged to the extent that we no longer find his statements worthy of belief. The Board of Appeals and Review was not so forthright but did say it concurred in the Examining Office's findings regarding the specifications dealing with the New York trip and was "not persuaded that these three specifications resulted from [plaintiff's] misunderstanding of his rights while in a travel status." These conclusions as to credibility are fully supported by the administrative record and we cannot, nor do we wish to, overturn them. *Cf. Sternberger* v. *United States*, 185 Ct. Cl. 528, 535–36, 401 F. 2d 1012, 1016–17 (1968).[3] It follows that, with plaintiff's testimony thus discounted, there was more than substantial evidence to sustain the two charges we are considering. Indeed, on that basis the record practically compels a determination that plaintiff deliberately falsified his records in order to obtain an advantage to which he would not be entitled and which he knew he could not rightly claim.

With his back against the wall, plaintiff counters that, in any event, there was no regulation expressly forbidding his going to and returning from New York (over the Thanksgiving weekend) on official time. But it is not the principle of the government world that everything is permissible which is not specifically prohibited by regulation or statute. Much is left to the common understanding that work-time is for work and those activities directly related to work—not for

(Continued)

Mr. McCarl's letter during the hearing, Mr. Pascal's recollection of the events of his flight to New York failed him. He could not even remember whether or not he had a ticket when he boarded the plane in Toronto."

In addition, the Government points out that, although Pascal testified that he made no reservations when he bought the round-trip ticket on November 8th, the ticket itself shows that he made a reservation for the 3:15 p.m. flight to New York on Wednesday, November 22d, and for the Monday, November 27th flight from New York which he actually took in returning to his duty station.

[3] Plaintiff collates every possible bit of favorable evidence in an effort to show that his story was true, but this kind of argument, while appropriate before the fact-finder, is not very useful in this court where the standard is not what we would believe on a *de novo* appraisal but whether the administrative determination is supported by substantial evidence on the record as a whole. *Cf. Davis* v. *United States*, 164 Ct. Cl. 612, 616–17 (1964). Measured by that criterion, there is no doubt that the record sustains the determinations of the Commission and the agency. The refusal to believe plaintiff was entirely permissible, particularly in view of his repeated inability to remember on cross-examination crucial facts which he would be very unlikely to forget. His testimony does not have the affirmative ring of credibility.

personal recreation or personal concerns. Plaintiff, a GS–12 revenue agent of substantial experience, must have known this. We agree with the Appeals Examining Office that "Mr. Pascal has been an employee of the Federal Government for approximately five and one-half (5½) years. We find it beyond belief that an employee with 5½ years of service would believe that he could travel for his own personnal [sic] pleasure on government time." [4]

Pascal then falls back with a blast of procedural objections, some of which relate only to the charges we have put aside but others touch upon the removal-reasons on which we center. These latter all fall short of their mark. Like many other claimants, plaintiff makes the mistake of believing that any procedural lapse, no matter how unrelated to the end-result, endows him automatically with a right to a judgment and to back-pay. We do not take that position but look to see not only whether an error occurred but whether it substantially affected plaintiff's rights in the removal process. *See Rasmussen* v. *United States*, *post* at 260.

In the successive chronological steps of the removal procedure plaintiff first attacks the pre-charge investigation conducted by the IRS Inspection Service as biased and incomplete (contrary to the requirements of the Inspection Manual). On this point it is enough to say that, at least with respect to the two charges on which we focus, plaintiff had a full, trial-type hearing at the Civil Service Commission, at which he had a full and fair opportunity to fill in any alleged gaps, or correct any alleged errors, made by the inspectors. Failure of the Inspection Service to conduct a full or proper pre-charge investigation would not vitiate the removal unless that investigatory failure tainted the adversary administrative hearing or process. Here, that was plainly not true; plaintiff was able to bring out at the hearing any relevant material he considered to have been omitted by the inspectors.[5]

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[4] The regulation permitting employees on away-from-home assignments to go home for the weekend obviously did not authorize non-weekend working time for that purpose (unless leave was taken).

[5] Plaintiff complains, too, that there were omissions in the investigatory file which was shown to him, but this point was not adequately raised before the agency or the Civil Service Commission and is not available here.

Next, Pascal complains that the agency attempted to coerce him to resign. This was not proved but even if it were it would make no difference. Plaintiff did not resign. The remedy of an employee whose resignation stems from duress is to have the Civil Service Commission treat the involuntary resignation as an adverse personnel action. *Gratehouse* v. *United States*, 206 Ct. Cl. 288, 296, 512 F. 2d 1104, 1108 (1975). Plaintiff, of course, received precisely that treatment and cannot expect to be placed in a better position simply because the alleged coercion failed to gain its objective.[6] There is also an assault on the oral reply, but it was given to the charging and removing officer (who was the Director of the Office of International Operations) and he met the standards we have laid down for the proper type of oral reply officer. *Peden* v. *United States*, 206 Ct. Cl. 329, 336, 512 F. 2d 1099, 1102 (1975); *Ricucci* v. *United States*, 192 Ct. Cl. 1, 425 F. 2d 1252, *motion for reconsideration denied*, 193 Ct. Cl. 120, 432 F. 2d 453 (1970). The content of the interview was likewise sufficient under *Grover* v. *United States*, 200 Ct. Cl. 337, 348–49 (1973); the reply officer seems to have made a conscientious effort to learn Pascal's reasoning and the actual facts as the employee saw them.

Above all, plaintiff charges that the agency was predetermined to remove him. This is a type of attack easy to make but here, as in so many cases, the claimant has not proven that his employer was set upon separating him regardless of how the facts turned out. Of course, if the evidence did turn out to support the first two charges, the agency had made up its mind—but there was nothing improper about that. On their face the charges were not demurrable. The crucial point is that plaintiff has failed to demonstrate that the Service would have been impervious if the proof failed to show that the facts were as charged.

Next, plaintiff complains that the Civil Service examiner accepted written unsworn statements from various persons, thus depriving him of the right to cross-examine and probe. The only such hearsay statements relevant to the two counts

[6] For the same reason it is immaterial that the hearing examiner refused to accept an affidavit from plaintiff's counsel bearing on some of the circumstances of the alleged attempt to coerce plaintiff to resign.

we are analyzing were those of the sales manager of the airline (Air Canada) and of an IRS employee who testified that her supervisor had told her that plaintiff could not properly seek *per diem* for the working days (over the Thanksgiving weekend) he was not in Toronto. The IRS inspector's testimony as to what he had been told by the airline official was thoroughly buttressed by the latter's written statements which were very precise and detailed, and related to matters as to which air carriers customarily keep specific records. There is no reason whatever to doubt the accuracy and truthfulness of this evidence. In an administrative hearing like that conducted here, hearsay is admissible if sufficiently convincing to a reasonable mind and if it reveals sufficient assurance of its truthfulness. *E.R. McKee Constr. Co.* v. *United States*, 205 Ct. Cl. 303, 310, 500 F. 2d 525, 528 (1974).[7] The other disputed hearsay testimony did not involve any factual issue but referred solely to a legal opinion of a particular administrative official which was obviously not binding on the Civil Service Commission if it viewed the law differently.[8]

Finally, Pascal urges that the penalty of removal was in any event too severe. Because we have put aside all but two of the charges originally levied, we need not consider whether discharge would be appropriate for the grounds (or any of them) no longer in the case as we shape it. The issue is, rather, whether removal was a proper sanction for the first two grounds relating to plaintiff's absence from Toronto over the Thanksgiving weekend of 1972.[9] On that we have no qualms on this record. The employee was found to have deliberately and intentionally falsified travel, work, and *per diem* records in an effort to obtain a distinct and substantial advantage from the Government. There is little doubt, as we have said,

[7] It is also significant that the airline manager was not an employee of the Federal Government and therefore not subject to an order to appear.

[8] Plaintiff also challenges the examiner's refusal to accept evidence that IRS later held meetings to clarify its travel practices and rules of conduct. But such steps by management may well have been prompted by plaintiff's own flagrant example and would not have any significant bearing on his subjective understanding of the requirements—particularly in the light of his obviously unreliable testimony at the hearing.

There is, in addition, a sally against the examiner's impartiality but we find the charge to be frivolous, and unworthy of specific answer.

[9] The Commission upheld the penalty even though it rejected two of the six charges, including the most flamboyant one, *i.e.* that plaintiff had acted improperly in Toronto in seeking female companionship. *See* footnote 1, *supra*.

that this determination was fully supported. The two charges were not trivial or even minor. We have consistently ruled that deliberate falsifications of this character bear on the "efficiency of the Service" and, once proved, warrant separation (if that is an authorized sanction). *See Birnholz* v. *United States*, 199 Ct. Cl. 532 (1972); *Grover* v. *United States*, 200 Ct. Cl. 337, 353–54 (1973); *Hoover* v. *United States*, 206 Ct. Cl. 640, 648–49, 513 F. 2d 603, 607–08 (1975); *Rifkin* v. *United States*, 209 Ct. Cl. 566, 585 (1976)[10] Here, removal was within the range of permitted penalties. Neither the agency nor the Civil Service Commission abused its discretion.[11] Contrast *Boyce* v. *United States*, *ante* at 57. It is immaterial that others would not have imposed the extreme sanction. *See Rifkin* v. *United States*, *supra*.

For these reasons, plaintiff's motion for summary judgment is denied and the defendant's motion is granted. The petition is dismissed.

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543 F. 2d 1298

KALVAR CORPORATION, INC. v. THE UNITED STATES

[No. 249–75. Decided October 20, 1976. Plaintiff's motion for rehearing and motion for leave to amend petition denied January 7, 1977]

ON DEFENDANT'S AND PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT

Contracts; termination; breach v. termination-for-convenience; reimbursable costs.—Plaintiff was granted a "primary source of supply" contract to provide General Services Administration (GSA) with its 1973 requirements for certain film to be supplied to other agencies upon order. GSA determined, on the basis of information supplied by plaintiff and Xidex Corporation (the 1972 primary source supplier to GSA), that certain films requested by the Internal Revenue Service to meet its special needs for 1973 were beyond the scope of plaintiff's contract. Plaintiff contracted to

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[10] *Power* v. *United States*, 209 Ct. Cl. 126, 531 F. 2d 505 (1976), is distinguished in *Rifkin* v. *United States*, *supra*, on grounds which are equally applicable here.

[11] We are satisfied that, if the first two grounds stood alone, the same sanction would have been justified, and would have been imposed and upheld on the record made with respect to those charges. *See* footnote 1, *supra*.

Syllabus

supply one thickness of the film in an amendment to its contract, and Xidex separately contracted to supply three thicknesses of its film. In December 1972, after testing Xidex's film, plaintiff notified GSA that Xidex's film was within the specifications of plaintiff's original contract, that all GSA requirements, including IRS's special order, could be satisfied from plaintiff's original contract, and that GSA had breached its contract by not limiting the supply of film to plaintiff. GSA and the Comptroller General rejected plaintiff's contentions, and plaintiff then filed the present breach of contract action. At oral argument, defendant showed that the contract incorporated standard provisions which converted any breach to a termination-for-convenience. By order issued June 8, 1976 the court found that a termination-for-convenience clause was included in the contract by reference and requested the parties to submit supplemental briefs to determine whether defendant had evinced bad faith or a clear abuse of discretion in its action, and whether plaintiff incurred any costs that are recoverable under said clause. It is *held* (1) that plaintiff has failed to make a sufficient showing of bad faith or abuse of discretion by the Government; (2) that the claims for recoverable costs incidental to a termination for convenience are outside the scope of the termination clause and are denied; and (3) that the only costs which plaintiff is entitled to recover as "legal expenses reasonably necessary for the preparation of settlement claims" are the reasonable attorney's fees incurred by plaintiff in the preparation and filing of its supplemental statement and brief pursuant to the court's order. The case is remanded to the trial judge for proceedings to determine the reasonable value of the said legal services. Otherwise, defendant's motion for summary judgment is granted and plaintiff's cross-motion is denied.

Presumptions; official actions of Government officials; presumption of regularity; bad faith; how established.

[1] There is a strong presumption that public officials act conscientiously in the discharge of their duties; in any consideration of an allegation of bad faith, well-nigh irrefragable proof tantamount to evidence of some specific intent to injure the plaintiff is required to induce the court to abandon the presumption.

Evidence ⇐ 83(1)

Contracts; termination; convenience-of-Government termination; bad faith.

[2] The mere fact that a contracting officer awards a contract to another after terminating the plaintiff's contract is insufficient to show bad faith. There must be proof of malice or conspiracy against the plaintiff.

Public Contracts ⇐ 18

Contracts; interpretation; incorrect reading by Government officials.

[3] An incorrect reading of a contract by Government officials is

not tantamount to malice or bad faith sufficient to overcome the presumption that Government officials act conscientiously in discharge of their duties.

Evidence ⇐ 83(1)

Contracts; termination; convenience-of-Government termination; bad faith.

[4] Mere error on the part of the Government, even if it would constitute sufficient ground for contractual breach were the termination-for-convenience clause inapplicable, is insufficient to overcome the presumption of regularity of actions of Government officials inherent in the invocation of the termination for convenience.

Evidence ⇐ 83(1)

Contracts; termination; convenience-of-Government termination; profits anticipated.

[5] Under a termination-for-convenience clause, a Government contractor is not entitled to recover anticipatory profits.

Public Contracts ⇐ 23

Contracts; termination; convenience-of-Government termination; reimbursable costs; loss on materials purchased.

[6] Normally, upon convenience termination, a contractor is entitled to the difference between the cost of materials purchased to perform the contract and their market price at the time of termination, but this rule applies only to the loss which a contractor would suffer upon resale.

Public Contracts ⇐ 23

Contracts; termination; convenience-of-Government termination; reimbursable costs; financing costs of inventory.

[7] Subpart 1–15.2 of the Federal Procurement Regulations, incorporated by reference in termination-for-convenience clause, 41 C.F.R. § 1–8.701(f), prohibits interest on borrowing (however represented), bond discounts, costs of financing or refinancing operations; accordingly, the interest cost of financing inventory which plaintiff had prepared in anticipation of performance of its requirements contract is not recoverable.

United States ⇐ 74(5)

Contracts; termination; convenience-of-Government termination; reimbursable costs; higher unit costs.

[8] Where plaintiff entered into a "requirements" contract which could in good faith be terminated as soon as the Government's requirements ceased, any higher unit costs suffered by plaintiff upon reduction in sales by reason of premature contract termination are not reimbursable. Plaintiff assumed the risk of such termination when it entered into the contract.

Public Contracts ⇐ 23

Opinion of the Court

Contracts; termination; convenience-of-Government termination; when breach may be deemed convenience termination; limitations on recovery.

[9] Absent bad faith or clear abuse of discretion, the effect of a constructive termination for convenience is to moot all breach claims and to limit recovery to costs which would have been allowed had the contracting officer actually invoked the clause. Thus, plaintiff may not recover on its claim for reimbursement of administrative, legal fees, and other expenses associated purely with the alleged breach of contract.

Public Contracts ⇐ 23

Contracts; termination; convenience-of-Government termination; reimbursable costs; settlement costs; legal services.

[10] Since the court has found that the subject contract was constructively terminated for convenience, under the termination clause reasonable costs of settlement, including legal expenses reasonably necessary for preparation of settlement claims, are reimbursable. Where plaintiff incurred legal expenses in preparation for settlement when it filed its supplemental brief pursuant to the court's order that it prepare a statement as to whether it incurred any costs that are recoverable under the termination-for-convenience clause, such expenses are reimbursable since these expenses, while arising after litigation began, are distinctly separate from the underlying asserted breach claim. It is only fair to allow plaintiff the equivalent of the legal expenses he would have incurred in preparing a settlement claim had the contracting officer properly invoked the termination-for-convenience clause. It is the nature and form of the legal activities, rather than the time when costs for legal services were incurred, which provide the proper focus of inquiry.

Public Contracts ⇐ 23

Valentine B. Deale, attorney for plaintiff.

Richard J. Webber, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before COWEN, *Chief Judge*, DURFEE, *Senior Judge*, SKELTON, *Judge*.

COWEN, *Chief Judge*, delivered the opinion of the court:

This case is before the court following the court's order of June 8, 1976, directing the parties to file supplemental briefs to assist us in deciding whether the matter in dispute may be

disposed of on the pending motions for summary judgment, or should be remanded for trial.

Plaintiff Kalvar Corporation was granted a "primary source of supply" contract to provide the General Services Administration (GSA) with its 1973 requirements of film having a speed rating between 1.05 and 1.45. As acknowledged under the contract, the precise extent of the GSA requirements was to be determined by orders placed by various Government agencies through the Federal Supply Schedules.

On October 19, 1972, the Internal Revenue Service requested the GSA to supply film to meet special needs of the IRS for fiscal year 1973; specifically, the IRS sought Kalvar's M–200 film, and HS–66 film to be supplied by the Xidex Corporation. (Xidex had been a primary source supplier to GSA in the year preceding Kalvar's contract.) The GSA determined, on the basis of information supplied by Kalvar and Xidex regarding their own films, that the films requested by the IRS were beyond the scope of Kalvar's primary source contract. Kalvar contracted to supply one thickness of its M–200 film in an amendment to its original contract, and Xidex entered into an additional contract with GSA to supply three thicknesses of its H–66 film.

In December 1972, Kalvar notified GSA that it disputed the additional contract with Xidex and withdrew its prior offer to supply the M–200 film. Kalvar had tested Xidex' HS–66 film and claimed it to be within the specifications of Kalvar's original primary source contract. It then became Kalvar's contention that all GSA requirements, including the special order of the IRS, could be satisfied from Kalvar's original contract, and consequently that the GSA had breached its primary source contract by not limiting its supply to Kalvar. The GSA rejected Kalvar's contention in administrative negotiations as did the Comptroller General upon subsequent appeal. Plaintiff then commenced a breach of contract action in this court.

At oral argument, plaintiff's breach suit was apparently foreclosed by defendant's showing that it had discovered, after the briefs had been filed, that the contract incorporated

standard provisions which, under the court's decision in *John Reiner & Co.* v. *United States*, 163 Ct. Cl. 381, 325 F. 2d 438 (1963), *cert. denied*, 377 U.S. 931 (1964), effectively convert any breach to a termination for convenience by the Government. On June 8, 1976, the court issued an order wherein we specifically found that such a termination-for-convenience clause was a part of the contract and requested the parties to submit supplemental briefs to determine: (1) whether defendant had evinced bad faith or a clear abuse of discretion in its actions; and (2) whether plaintiff has incurred any costs that are recoverable under the termination-for-convenience clause.

After consideration of the supplemental briefs of the parties, as well as their briefs in cross-motions for summary judgment, we find that plaintiff has failed to make a sufficient showing of bad faith or abuse of discretion by the Government. The assertions which plaintiff sets forth in its supplemental brief were all presented at oral argument and were denied by the court's order of June 8, 1976. Even if the order is disregarded and we examine each of the claims against the facts of record, we find that plaintiff has not made a sufficient showing of Governmental bad faith or abuse of discretion to raise a triable issue.

As to plaintiff's claims for recoverable costs incidental to a termination for convenience, we deny all of the specified claims as being outside the scope of the termination clause. However, we remand the case to the trial judge for a determination of the reasonable value of the legal services rendered by plaintiff's attorney in the preparation of its supplemental brief to the court.

I. *Plaintiff's Claim of Governmental Bad Faith*

Kalvar would infer Governmental bad faith from the "egregious nature" of the alleged contract violation, from a "pattern of uneven, discriminatory administration" against it and in favor of Xidex, and from an alleged "willful indifference" to Government regulations. Kalvar makes no conceptual distinction between "bad faith" and "abuse of discretion" and, for the purposes of this decision, we accept

Kalvar's equation of the two concepts.[1] To support its claims of bad faith, Kalvar presents six specific "illustrations" of GSA's "clear abuse of discretion." These six illustrations center upon four specific acts of the GSA:

A. That GSA "deliberately withheld" information from Kalvar regarding the IRS' special requirement for film and failed to give it the first opportunity to meet the special requirement under the primary source contract.

B. That GSA applied a double standard of treatment when it sought out Xidex in 1973 for supplies of the IRS-requested film, since in 1972 GSA had refused an offer by Kalvar to supply "out of spec" film while Xidex held the primary source contract.

C. That GSA made a "wholly arbitrary finding" that Xidex' HS–66 film was beyond the specifications of Kalvar's primary source contract, based only on Xidex' representations and without confirmatory testing.

D. That although GSA made no distinction between Kalvar and Xidex film when it requested that the two companies' films be placed on the supply schedule, it contracted with Xidex for supply of film in three thicknesses, but contracted with Kalvar for supply of only one thickness.

II. *The Merits of Kalvar's Claims of Bad Faith and Abuse of Discretion*

Any analysis of a question of Governmental bad faith must begin with the presumption that public officials act "conscientiously in the discharge of their duties." *Librach* v. *United States*, 147 Ct. Cl. 605, 612 (1959). The court has always been "loath to find to the contrary," and it requires "well-nigh irrefragable proof" to induce the court to abandon the presumption of good faith dealing. *Knotts* v. *United States*, 128 Ct. Cl. 489, 492, 121 F. Supp. 630, 631 (1954).

In the cases where the court has considered allegations of bad faith, the necessary "irrefragable proof" has been

[1] We need not decide whether bad faith is tantamount to abuse of discretion, since in our view plaintiff's claims indicate neither was present here. However, many of our prior decisions seem implicitly to accept the equivalence of bad faith, abuse of discretion, and gross error. *See Librach* v. *United States*, 147 Ct. Cl. 605, 614 (1959); *Levering & Garrigues Co.* v. *United States*, 71 Ct. Cl. 739 (1931); *see also* J. McBride & I. Wachtel, *Government Contracts* § 5.60[1] (1965).

equated with evidence of some *specific intent to injure the plaintiff*. Thus, in *Gadsden* v. *United States*, 111 Ct. Cl. 487, 489–90, 78 F. Supp. 126, 127 (1948), the court compared bad faith to actions which are "motivated alone by malice." In *Knotts*, *supra*, at 128 Ct. Cl. 500, 121 F. Supp. 636, the court found bad faith in a civilian pay suit only in view of a proven "conspiracy * * * to get rid of plaintiff." Similarly, the court in *Struck Constr. Co.* v. *United States*, 96 Ct. Cl. 186, 222 (1942) found bad faith when confronted by a course of Governmental conduct which was "designedly oppressive." But in *Librach*, *supra*, at 147 Ct. Cl. 614, the court found no bad faith because the officials involved were not "actuated by animus toward the plaintiff."

The mere fact that a contracting officer awards a contract to another company after terminating the plaintiff's contract is insufficient to show bad faith. As the court declared in *Colonial Metals Co.* v. *United States*, 204 Ct. Cl. 320, 331, 494 F. 2d 1355, 1361 (1974):

> * * * that the contracting officer knew of the better price elsewhere when he awarded the contract to plaintiff—in the absence of some proof of *malice or conspiracy against the plaintiff* (*cf. Librach* v. *United States*, 147 Ct. Cl. 605, 612–14 (1959))—means only that the contract was awarded improvidently and does not narrow the right to terminate. [Textual emphasis added.]

In view of the high standard of proof required to show bad faith (tantamount to a showing of malice or conspiracy), the plaintiff here fails to make its case for two reasons. First, the plaintiff's four specific allegations of bad faith were made in the briefs or at oral argument, and thus have been decided by the court's June 8, 1976 order. The court stated in its order that "it does not agree that the facts shown in the record * * * would enable the court to determine that the defendant was guilty of bad faith * * *." Since there are no new claims of bad faith, and no new evidence beyond plaintiff's vague offer to produce "testimony by cognizant personnel of plaintiff" (*see, e.g.*, Plaintiff's Supplemental Brief, p. 4), the court may justifiably deny plaintiff's motion.

Second, even if it is assumed that the court's June 8, 1976 order did not finally dispose of plaintiff's arguments, a close

examination of these contentions in the light of the available facts discerns no support for a finding of bad faith or abuse of discretion. Plaintiff's first charge is that the GSA had an obligation to disclose to it, as primary source supplier, the IRS special request before seeking new contracts. But as defendant pointed out in its moving brief, the Comptroller General ruled that the GSA had no such duty under the primary source contract. Even if defendant's and the Comptroller General's interpretations of the contract were incorrect, an incorrect reading of the contract by Government officials is not tantamount to malice or bad faith. *Nolan Bros. Inc.* v. *United States*, 186 Ct. Cl. 602, 606, 405 F. 2d 1250, 1253 (1969).

Plaintiff's second charge of bad faith is that in 1972 the GSA had rejected Kalvar's offer to provide film beyond the specifications of Xidex' then primary source contract, but in 1973 GSA accepted Xidex' offer to provide film beyond the specifications of Kalvar's primary source contract. However, in appendix "W" to plaintiff's cross-motion for summary judgment, it is stated that the GSA rejected Kalvar's 1972 offer precisely because GSA believed the offered film to be *within* the scope of Xidex' primary source contract. Thus, GSA's actions in 1973 were not inconsistent with its actions in 1972. It felt that the film offered by Kalvar in 1972 was within the "spec" of Xidex' contract, and thus not purchasable, whereas GSA decided that Xidex' film offered in 1973 was "out of spec" and purchasable (this determination by GSA was upheld by the Comptroller General; *see* Plaintiff's Appendix "X"). If GSA's determination was erroneous, it nevertheless does not rise to the level of an action taken in bad faith.

Plaintiff's third argument is that GSA made a wholly arbitrary finding that Xidex film (HS–66) was beyond Kalvar's 1973 contract, relying solely upon Xidex' representation and without testing the film independently. However, it is undisputed that GSA had always relied upon the manufacturers' representations regarding the specifications of their films, because GSA had no testing equipment of its own. In this instance, GSA accepted a statement made by Xidex as to the speed rating of its HS–66 film. After the speed rating

was challenged by plaintiff, GSA obtained a confirmation of the statement previously made by Xidex, believing that Xidex had made a rating upon the basis of good faith testing. Plaintiff may well argue that GSA's practice was unwise in this regard and indeed the manufacturers agreed to and GSA later adopted a new testing procedure, which came too late to affect plaintiff's contract. However, even if GSA's reliance upon information furnished by Xidex was misguided or if the information was erroneous, neither of these is sufficient to show bad faith.

Plaintiff's final allegation is that GSA contracted for only one thickness of the special new film from Kalvar but contracted for three thicknesses from Xidex, and that this different treatment is indicative of prejudice toward Kalvar. But the reason for the GSA action, as the record reveals, is that Kalvar offered to supply only one thickness of the film, whereas Xidex offered three. Certainly no Governmental bad faith can be inferred from treatment which resulted from plaintiff's own offers.

In summary, we hold that Kalvar has made an insufficient showing of malicious intent or "animus" toward it in order to avoid the limitations of the termination-for-convenience clause. Mere error on the part of the Government, even if it would constitute sufficient ground for contractual breach were the termination clause inapplicable, is insufficient to overcome the presumption of regularity inherent in the invocation of the termination for convenience. *Librach*, *supra*, at 614.

III. *Plaintiff's Claims for Cost Reimbursement*

The remaining question before us is whether, under the termination-for-convenience clause, plaintiff is entitled to the costs which it now asserts to be reimbursable. Kalvar asserts five general categories of such costs in its brief:

> A. The difference between the price of film under the Government contract and the price Kalvar obtained when it subsequently sold the "terminated inventory" to other private buyers. Asserted Cost: $13,555.
>
> B. Costs of financing plaintiff's inventory which had been prepared for meeting anticipated contract demands

for film. Asserted Costs: $17,250 (18 percent of plaintiff's "average investment in inventory during the period of defendant's breach").

C. An "equitable adjustment" to compensate plaintiff for higher unit costs in its subsequent sales to the Government, brought about by lower production runs for the Government's decreased demand. Asserted Costs: $35,738.

D. Administrative, quality control and testing expenses associated with the alleged breach of contract. Asserted Costs: $3,250.

E. Legal fees incurred in administrative negotiations over the original breach of contract claims, before filing suit in this court. Asserted Costs: $14,925.

At least three of plaintiff's asserted costs (claims A, B and C) are not recoverable because they clearly pertain only to anticipatory profits, which are barred by the termination-for-convenience clause. *Colonial Metals Co.* v. *United States*, *supra*, at 204 Ct. Cl. 332–33, 494 F. 2d 1362. That plaintiff seeks anticipatory profits is perhaps most evident in claim A, wherein plaintiff claims the difference between the price of film under the Government contract and the price under subsequent private contracts.

Normally upon termination, a contractor is entitled to the difference between the cost of materials purchased to perform the contract and their market price at the time of termination. *Baker Food Products Corp.* v. *United States*, 75 Ct. Cl. 591, 596 (1932). This rule applies only to the loss which a contractor would suffer upon resale. It is obviously inapplicable where, as here, the contractor makes some profit upon "covering" the goods. Clearly, when a contractor seeks the difference between the prices he obtained in a profitable "covering" sale and the prices he would have obtained under the terminated contract, he is in effect demanding anticipatory profits. Indeed, plaintiff in its petition labeled this claim as one for "lost profits." (Plaintiff's Petition, p. 10, para. 25.)

Similarly, Kalvar's claim B seeks compensation for "financing costs" of the inventory it had prepared in anticipation of the Government's requirements under the primary source contract. Plaintiff carefully avoids claiming reimbursement for the costs of the inventory and supplies themselves, since

those costs are expressly disallowed by 41 C.F.R. § 1–8.701(e)(2)(i).

What plaintiff fails to note is that the termination-for-convenience clause, 41 C.F.R. § 1–8.701(f) also incorporates by reference subpart 1–15.2 of the Federal Procurement Regulations. Among the provisions of that subpart, section 1–15.205–17 specifically prohibits "[i]nterest on borrowings (however represented), bond discounts, costs of financing or refinancing operations * * *." Thus even if the cost of the inventory and supplies were allowable, the interest cost of financing those inventory and supplies may not be reimbursed.[2]

Plaintiff's claim C is for reimbursement for the "higher unit costs" which followed the reductions in Kalvar's Government sales (plaintiff was able to sell only a reduced quantity to other purchasers). Again, this claim looks to the unit costs Kalvar *would have enjoyed* had its original contract been continued. Thus the claim seeks consequential damages and also involves anticipatory earnings. Moreover, the claim overlooks the fact that the original primary source contract was not for a fixed supply, but rather was a "requirements" contract, which could in good faith be terminated as soon as the Government's requirements ceased. Kalvar assumed the risk of any premature termination when it entered into the contract.

The remainder of Kalvar's asserted costs (items D and E) are claims which on their face seek reimbursement for costs related to the alleged breach rather than to the termination itself. The theory underlying this position is Kalvar's belief that since breach is equated to termination for recovery purposes, "equity would seem to require" that expenses associated with breach at the administrative level "be on a parity" with expenses associated with termination.

Plaintiff's theory misconstrues the law in the area of constructive termination for convenience. In *John Reiner & Co.* v. *United States*, *supra*, 163 Ct. Cl. at 390–91, 325 F. 2d at 442–

[2] If the prohibition on interest were not applicable here, it is still difficult to perceive plaintiff's argument that interest is reimbursable. The financing costs for the inventory are eventually paid by the sale of the inventory, and thus would appear to be a direct "cost of supplies," which plaintiff has already recognized as not being allowable.

43, this court first applied the constructive termination-for-convenience doctrine in a case where the contracting officer had not actually invoked the clause in administering the contract. In the absence of bad faith or clear abuse of discretion, the effect of the constructive termination for convenience is to moot all breach claims and to limit recovery to costs which would have been allowed had the contracting officer actually invoked the clause. *Nolan Bros., Inc., supra*, at 186 Ct. Cl. 608–10, 405 F. 2d 1254–55. Thus, although the Government has contested all of Kalvar's breach claims, we need not consider the merits of any claim for breach of contract here. Any award of damages must be limited to items specifically allowed by the termination clause.

It follows that Kalvar's claim D, for reimbursement of administrative and other expenses associated with the alleged breach, may not be granted in this case because the allowance of such costs would in effect permit recovery of some of the underlying breach claims. This would render the termination procedure meaningless. The termination-for-convenience clause, 41 C.F.R. § 1–8.701 limits recovery to: (a) completed supplies accepted by the Government, (b) costs of performance of terminated work, and (c) costs of settling and paying claims arising out of the termination. 41 C.F.R. § 1–8.701 (e) (1–3). Although the expenses sought in claim D are administrative, and in that sense resemble costs of settling and paying claims under (c) above, they do not arise out of the "termination," but rather out of an alleged breach. Hence they may not be recovered here.

Plaintiff's claim E, for legal fees involved in the assertion of breach claims, presents a more difficult and novel problem. Under the preceding analysis, plaintiff may not of course recover legal fees associated purely with the breach claims. However, we must decide whether Kalvar may recover legal expenses that should properly be considered as settlement expenses in a termination for convenience by the Government.

The termination-for-convenience clause, 41 C.F.R. § 1–8.701 (e) (3), explicitly allows "reasonable costs of settlement, including * * * legal * * * expenses reasonably necessary for the preparation of settlement claims." Normally

these expenses would arise at the administrative level, in negotiation following the contracting officer's termination order. Here, however, the termination is constructive, by imposition of the court, and hence plaintiff had no opportunity to engage in settlement negotiations at the administrative level. In essence, plaintiff's legal expenses in preparation for settlement were incurred when it filed its supplemental brief pursuant to the court's order that it prepare "a statement as to whether plaintiff incurred any costs that are recoverable under the termination-for-convenience clause * * *."

We are well aware that section 2412 of title 28 of the U.S. Code prohibits the court from awarding attorney's fees in "any civil action brought by or against the United States * * *." However, we view the principles of the statute to be inapplicable to costs which, had proper procedures been followed, would naturally have arisen in the process of settlement rather than in a court action brought against the United States. Section 2412 is expressly limited to "civil actions," and thus applies only to adversary proceedings in the process of litigating actual disputes. Here, the claim for attorney's fees arose after litigation began, but it is distinctly separate from the underlying breach claims asserted by plaintiff. Rather than being a proper part of the civil action, attorney's fees that pertain to the procedure of a negotiated settlement are unrelated to the assertion of disputed contract rights.

In determining the allowability of a contractor's claim for attorney's fees, it is the nature and form of the legal activities, rather than the time when costs for the legal services were incurred, which provide the proper focus of inquiry. Thus, in *Acme Process Equipment Co.* v. *United States*, 171 Ct. Cl. 251, 347 F. 2d 538, (1965), this court allowed legal fees incurred in an unsuccessful termination settlement even though the fees were for work performed after the plaintiff had filed an administrative appeal.

The distinction recognized in *Acme Process* is consistent with the position espoused by the Boards of Contract Appeals. Although the Boards frequently note the prohibition against attorney's fees and refuse to reimburse the contractor for costs not specifically permitted by contract provisions,

they will allow legal fees "to the extent reasonably necessary for the preparation and presentation of settlement proposals * * *." *Reed & Prince Mfg. Co.*, ASBCA 3172, 59–1 BCA 2172 at 9484 (1959). *See also*, *Appeal of Grumman Aerospace Corp.*, NASA BCA 87311, 76–1 BCA 11763 (1976).

As previously noted, the constructive termination for convenience is a legal fiction which imposes the standard limitations of the termination clause upon a plaintiff even though the termination was never actually ordered by the contracting officer. The court in such a case proceeds as if the termination had in fact been ordered. Since the constructive termination for convenience limits the contractor to those claims he would have incurred had there been an actual termination, it is only fair to allow the contractor the equivalent of the legal expenses he would have incurred in preparing a settlement claim after actual termination. In this case, these are the costs Kalvar has incurred as a result of the court's order. Admittedly, our allowance of legal expenses in this case rests upon a liberal reading of the termination clause and upon an analogy drawn between termination costs in administrative proceedings and similar costs resulting from a court-imposed convenience termination. The use of such an analogy has been specifically approved by this court for solving the uncertain and difficult questions that arise in constructive termination-for-convenience cases. *Inland Container Co.* v. *United States*, 206 Ct. Cl. 478, 493, 512 F. 2d 1073, 1081 (1975).

The only costs which plaintiff is entitled to recover as "legal expenses reasonably necessary for the preparation of settlement claims" are the reasonable attorney's fees which plaintiff incurred in the preparation and filing of "Plaintiff's Supplemental Statement And Brief," which was filed pursuant to the court's order of June 8, 1976. Since there is no evidence of the cost or reasonableness of the fee, it is necessary to remand the question to the trial judge for his determination.

IV. *Conclusion*

The case is remanded to the trial judge for his determination by trial or other proceedings of the reasonable cost of preparing and filing "Plaintiff's Supplemental Statement

Syllabus

And Brief." Except for this unresolved question, defendant's motion for summary judgment is granted and plaintiff's cross-motion for summary judgment is denied.

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543 F.2d 125

GULF + WESTERN PRECISION ENGINEERING CO. v. THE UNITED STATES

[No. 335-70. Decided October 20, 1976] *

ON PLAINTIFF'S NOTICE AND MOTION, AND DEFENDANT'S RULE 150(D) CROSS-MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT, AND PLAINTIFF'S RULE 141(B) MOTION

Contracts; performance; advisory specifications; constructive change.—This case, involving a contract for production of Talos guided missile warheads, is again before the court. On January 4, 1974 the court entered an order (203 Ct. Cl. 732) remanding the case to the Armed Services Board of Contract Appeals for reopening, admission of certain new exhibits and further consideration. The Board had previously denied plaintiff's claim under the contract's Disputes and Changes clauses for increased costs which plaintiff attributed to defective Government-furnished specifications and drawings. On remand the Board again denied the claim. During contract performance the first four preproduction sample warheads failed the required ballistic tests; in fabricating the samples plaintiff followed only the contract's mandatory drawings and design specifications, substituting its own techniques of fabrication for certain advisory specifications in the contract. Thereafter, preproduction samples were manufactured in accordance with the mandatory and advisory specifications and, after testing, it became clear that the ballistic specifications would never be met under the contract's original design specifications. The performance requirements were relaxed by the Government to conform to the capability of the product to be manufactured in accordance with the existing specifications (considered a constructive change), production continued and the contract was completed. It is *held* that plaintiff is not entitled to reimbursement for its pre-change additional costs because they were incurred only as the direct and proximate result of its attempt to produce in accordance with its own less costly techniques, rather than the advisories. It is also *held* that the extra costs which plaintiff allegedly incurred by following the advisories in finally performing the contract were not extra costs incurred as a consequence

*Plaintiff's suggestion for rehearing *en banc* and motion for reconsideration were denied January 5, 1977. Bennett, *Judge*, would allow the said suggestion and motion.

of the constructive change. Plaintiff's motion under Rule 141(b) is denied, defendant's cross-motion for summary judgment is granted, plaintiff's motion for summary judgment is denied, and Counts III and IV are dismissed.

Contracts; performance; advisory specifications, failure to follow.

[1] Where plaintiff followed the original mandatory drawings and design specifications in fabricating the required preproduction models, but ignored the advisory specifications and elected to employ welding techniques of its own, and the models failed the contract ballistic tests, although the specifications were defective in specifying ballistic requirements that could not be met under either the mandatory or advisory specifications, in rejecting the teaching of the advisories plaintiff assumed the risk that its own techniques would not yield an acceptable result.

United States ⇐ 70(32)

Contracts; performance; advisory specifications; performance in compliance with specifications.

[2] Although the original specifications were defective in specifying ballistic requirements that could not be met under either the mandatory or advisory specifications and the contract was constructively changed by relaxing the performance requirements, where plaintiff manufactured the contract item in accordance with the contract's advisories and was aware that the Government stood ready to accept the items produced strictly in accordance with the advisories even if they were not capable of satisfying the original or modified ballistic requirements, plaintiff is not entitled to extra costs since they were not incurred as a consequence of the constructive change but were incurred in producing an item in a manner not only permissible under the original specifications and drawings but suggested by them.

United States ⇐ 70(29)

Glade F. Flake, attorney of record, for plaintiff. *Thomas E. Harrison*, and *Wachtel, Wiener, Ross & Matzkin*, of counsel.

Ray Goddard, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before LARAMORE, *Senior Judge*, DAVIS and BENNETT, *Judges*.

LARAMORE, *Senior Judge*, delivered the opinion of the court:

This government contract case, governed by the Wunderlich Act, 41 U.S.C. §§ 321 and 322, is before us for the second

time. Initially, we declined to accept the recommendation of the Trial Judge that we grant summary judgment for the plaintiff contractor[1] and reverse the decision of the Armed Services Board of Contract Appeals ("ASBCA" or the "Board") dismissing plaintiff's claim.[2] Instead, by Order,[3] we remanded that portion of the case then under consideration, involving review of the Board's action, for reopening and further consideration. The part remanded contained only the claims found in the third and fourth causes of action of plaintiff's four-count petition, as only those counts concerned review of the Board's decision.

Now, upon further consideration of the record, the briefs and arguments of counsel, and a review of the Board's decision after remand,[4] we conclude that the Board's action was neither arbitrary, capricious, unsupported by substantial evidence, nor contrary to law. Therefore, counts three and four of the petition, involving review of the Board's decision, must be dismissed.

I. History of the Case

The contract at issue herein was awarded in response to a proposal submitted by plaintiff to the Navy upon its request for proposals for the production of Talos guided missile warheads. Four preproduction sample warheads, submitted for plant inspection as required by the contract, were approved by the Navy inspector for shipment and ballistic testing to be performed at a naval installation. However, plaintiff was thereafter informed that these samples had failed the ballistic tests, and the production and delivery schedule was postponed pending an investigation. In the course thereof, the failure of the ballistic tests was attributed by the parties to the fact that in fabricating the samples, plaintiff had followed only the contract's mandatory drawings and design

[1] Plaintiff was, at the time of the contract, known as Portland Copper & Tank Works, Inc.

[2] *Bliss-Portland*, ASBCA No. 12453, 68–2 BCA, ¶7270. At the time of this initial decision of the Board, plaintiff was known as Bliss-Portland. It was thereafter acquired by Gulf + Western Precision Engineering Company, as above-captioned.

[3] *Gulf and Western Precision Engineering Company*, 203 Ct. Cl. 732 (Order of January 4, 1974).

[4] *Bliss-Portland*, ASBCA No. 12453, 75–1 BCA, ¶11,118.

specifications, substituting its own techniques of fabrication for references in the contract to certain advisory or suggested techniques.[5]

The problem with the samples tested appeared to involve the configuration of the weld hinge in what was termed the rod bundle of the warhead. Basically, the warhead was composed of a hollow cylinder with an explosive cavity. The rod bundle consisted of individual square steel rods welded together at their ends to produce an item somewhat resembling an expansion wrist watch band. For various technical reasons, the manner, shape and strength of the welds were vital to the warheads' performance.[6]

A second group of four preproduction samples was subsequently manufactured in accordance with the mandatory *and* advisory specifications. These were then test-fired. While plaintiff was advised that these samples were acceptable, it is now clear that they never actually satisfied the ballistic test requirements contained in the contract which, it also turns out, could never have been met consistently even through the use of both mandatory and advisory specifications. In short,

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[5] Sometime after the initial preproduction samples had been rejected by the government, plaintiff wrote to the contracting officer and advised that it would furnish four additional preproduction samples for ballistic testing, and that these would be manufactured in strict accordance with the contract, except that references therein to advisory drawings would also be considered mandatory. The letter went on to request an amendment to the contract to include the advisories as part of contract mandatory requirements. This was said, by plaintiff, to be a change order designed to more closely align the manufacturing specifications with the performance specifications.

While this request for a formal change order was denied, plaintiff was informed that the government was taking the position that the existing contract specifications already permitted fabrication in accordance with the advisory drawings.

[6] Each rod was about 19¼" long and ¼" wide on each of its four sides. The rods were welded together to produce an item somewhat resembling an expansion wrist watch band. There were upper and lower layers of rods. Each layer was placed parallel to the other. One end of an upper rod was welded to the corresponding end of a lower rod. The other end of the upper rod was welded to the corresponding end of the adjacent lower rod. When stretched apart, the result was something like a continuous series of W's (*i.e.*, WWW).

The rod bundle was wrapped around the hollow cylinder containing the explosive. When the explosive was detonated, the rod bundle was designed to expand outward at high velocity to form a continuous hoop of steel, to be propelled toward a target at approximately 4,000 feet per second. The welds at the ends of the rods were intended to serve as hinges during the expansion of the rod bundle into a hoop. The end product, going through the air, was meant to either sever a missile structure or airplane fuselage, or so damage the structural member that the flying load of the airplane would break the fuselage.

the contract was impossible to strictly perform, because the performance required exceeded that given by the product called for in the contract's drawings and designs.

Suffice it to say, production was allowed to proceed using as a model the second set of samples. The contract was completed and the fixed payment made by the government thereunder.

Plaintiff filed a claim under the "Disputes" and "Changes" clauses [7] in the contract, for increased costs it attributed to the defects in the contract specifications. The claim was denied by the contracting officer and also on appeal by the Secretary of the Navy, represented by the ASBCA. Thereafter, plaintiff filed a petition in this court under our basic jurisdictional statute 28 U.S.C. § 1491, also citing the Wunderlich Act, *supra*.

The petition asserts four causes of action. The first contends a breach of contract in that plaintiff was required to embark upon a research and development program to pass the ballistic requirements, and to alter its manufacturing methods to "hand make" the warheads, while defendant knew

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[7] "3. *CHANGES*

"The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes in the drawing and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. * * * If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Clause 6 hereof. But nothing provided in this clause shall excuse the Contractor from proceeding with the prosecution of the work as changed. Except as otherwise herein provided, no charge for any extra work or material will be allowed.

"6. *DISPUTES*

"(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under the contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. * * *

"(b) This 'Dispute' clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above: *Provided*, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law."

that they would not consistently pass the ballistic tests whatever plaintiff did, and failed to so advise plaintiff. The second cause of action alleges a breach of contract in that plaintiff was advised that its second submission of preproduction samples met ballistic test requirements, when it did not, causing plaintiff to institute and to continue extraordinary manufacturing procedures not required by the contract. The third cause alleged that the government-furnished specifications were defective in that, if followed, the warheads would not meet the ballistic test requirements of the contract, and the decision of the ASBCA to the contrary was arbitrary, capricious, not supported by substantial evidence, and legally erroneous in its interpretation of the contract. Finally, as a fourth cause of action, plaintiff alleges that the ASBCA was arbitrary, capricious and legally in error in denying plaintiff's timely motion for reconsideration when it came to light that defendant was withholding information as to the true status of the ballistic test results.

At a pretrial conference, it was concluded that the parties should initially file cross-motions for summary judgment with the Trial Judge with respect to Counts III and IV, presenting their respective positions with regard to the Board's decision, without prejudice to plaintiff's right to claim entitlement to a trial on the counts alleging breach of contract, should they remain after the decision on the motion. Cross-motions were thereupon filed and briefed.

As indicated above, the Trial Judge recommended that we grant plaintiff's motion and remand the case to the ASBCA for a determination of the amount of the equitable adjustment to which plaintiff was to be entitled. Upon review pursuant to Rule 54(b), we remanded the case, but for a different purpose. Our Order directed that the case be reopened by the Board, certain new evidence admitted [8] and, finally, that the case be reconsidered. Upon remand, in a second opinion, the Board again denied plaintiff's claim.

[8] The exhibits concerned were documents which had been received by the Board in another case, *General Precision, Inc.*, ASBCA No. 12078, 70-1 BCA ¶ 8144, heard and decided approximately one and a half years after the Board's initial decision in the instant case. The former involved a claim pertaining to a procurement of warheads manufactured according to specifications almost identical to the ones now in question. There the Board had considered the exhibits here at issue in reaching its conclusion that General Precision's warheads had not passed the ballistic test requirements after the advisory specifi-

Opinion of the Court

Following this second Board decision, both parties filed with the court the notices required by Rule 150(d). Plaintiff urged further action by the court, while defendant was content to let the decision of the Board stand.

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cations had been followed and that, therefore, the specifications were defective. In the case at hand, plaintiff had sought by motion to reopen its case before the Board on the basis of these exhibits. The Board declined. We reversed the Board on that point, but concluded that the case was not then ready for final determination in light of Wunderlich Act standards which do not permit us to make a final determination as to entitlement on the basis of evidence which the Board refused to receive into the record, or on fact findings in another case.

After the Board received the remand order the parties were directed to file a statement of issues, in connection with which the Board sent the parties the following letter:

"Gentlemen:

"The time to file a statement of issues is extended for thiry days. In arriving at a statement of issues the parties should consider, *inter alia*, the following facts:

"1. The Court's remand order requires reopening of the record and 'reconsideration, including all evidence relevant to the issue as to whether plaintiff's preproduction warheads met the ballistic test requirements, or whether it was possible to meet these requirements under the specifications, either mandatory or advisory.'

"2. This ruling was apparently precipitated by the Board's denial of the motion to reopen and reconsider in the light of exhibits tending to show that the ballistic requirements could not be met.

"3. Throughout the claim and appeal, *i.e.*, from the time of its claim letter of 11 April 1966 through its second reply brief, appellant consistently took the position that, when it used the 'mandatory' specifications, it failed to meet the test requirements; but, when it followed the 'advisory' specifications, it did meet contract requirements or 'successfully completed its warhead production.'

"4. The costs claimed were those of following the advisory specifications to achieve that successful production. Nowhere was a claim made that costs were incurred in an effort to meet the ballistic requirements one hundred percent when such a result was impossible. Nowhere did the Board find that appellant or anyone else achieved such a result. The record does not indicate that appellant thought its second preproduction units met the ballistic requirements one hundred percent. The 3 September 1963 letter merely says they were 'considered acceptable.' Respondent's exhibit 4, page two of the DD 375, shows the contractor received the firing results September 9, 1963. And appellant's own witness testified at the hearing to his knowledge that the Government reduced the continuity requirement, and accepted appellant's production without requiring that it meet the specifications one hundred percent.

"Accordingly there was no issue before the Board of whether the specifications were defective in specifying an impossible set of ballistic requirements. Appellant did not claim it tried but failed to meet such requirements. Knowing that it met only the reduced requirements, appellant claimed it succeeded, but only by following the 'advisories.' Its claim was that it was not permitted to use the advisory specifications under the contract as awarded; therefore, when it was necessary to follow them to achieve successful production, it was doing extra work.

"Under these circumstances, and taking into account the Board's decision in *General Precision, Inc.*, ASBCA No. 12078, 70–1 BCA, ¶8144, the parties should consider whether it may be stipulated as a fact, with no further need for evidence or argument, that the specifications were defective insofar as they specified ballistic requirements which could not consistently be met under either the mandatory or advisory specifications. If so, it would appear that the Board could now simply reopen the record to admit the exhibits offered on the

(Continued)

In response to these notices, the Trial Judge ordered plaintiff to file a motion under Rule 141(b) requesting the court to adopt, with some modifications, the Trial Judge's previously recommended opinion. The case is, therefore, before us now on the parties' Rule 150(d) cross-notices, which are deemed to incorporate and reassert their prior cross-motions for summary judgment, and plaintiff's Rule 141(b) motion.

II. The Third and Fourth Causes of Action

Counts III and IV of the petition request Wunderlich Act review of the decision of the Board denying plaintiff's claim. Count IV requires little, if any, further consideration. As noted above, it alleges that the Board was arbitrary in refusing to reopen plaintiff's case, admit new evidence and reconsider the matter, and the Board, under our instructions upon remand, reopened the case, admitted the new evidence, reconsidered the case and rendered a second decision.

The merits of the case, insofar as Wunderlich Act review is requested, are actually found in the third cause of action. Consideration of this count's charge that the Board erroneously interpreted the subject contract requires further scrutiny of the contract terms.

The contract required that the warheads be "manufactured in strict accordance with the Bureau of Naval Weapons List of Drawings L.D. 534515, Revision A, and the drawings and specifications listed thereon." The provision continued:

> * * * The following list of drawings and specifications shall be applicable to the warhead assemblies to be furnished hereunder.
>
> * * * * *

(Continued)
motion for reconsideration and receive the parties' stipulation. Then the parties could submit briefs on the effect of the exhibits and the stipulation on the Board's reconsideration of the appeal. This would expedite the proceedings on remand and, in the event the Board's reconsideration were not favorable, would permit more speedy return to the Court of Claims."

The parties agreed to a stipulation of facts and the submission of the exhibits that had previously been offered with the motion for reconsideration. In the stipulation the parties agreed that plaintiff's witness testified as to his knowledge that the government accepted plaintiff's production without requiring that it strictly meet the contract ballistic specifications. The parties also stipulated that there was no objection to the Board finding as a fact that the specifications were defective insofar as they specified ballistic requirements which could not be met consistently under either the mandatory or advisory specifications.

Drawing 2176094, Sheet 1, Revision B (Confidential).
Drawing 2176094, Sheet 2, Revision B (Confidential).
Drawing 2176094, Sheet 3, Revision A (Confidential).

* * * * *

[The actual list included numerous other drawings]
Specification O.S. 11705 (Confidential).[9]

Drawing 2176094, Sheet 3, contained details "P" and "R", which provided a representation of the weld hinge in the rod bundle referred to earlier. It will be remembered that this weld hinge was identified by the parties as the source of the unsatisfactory ballistic performance of plaintiff's first set of preproduction samples.

There is considerable evidence in the record that plaintiff relied entirely upon its own technology and details "P" and "R" in fabricating the weld hinges in its first set of preproduction samples even though drawing 2176094 also referred, in a note, to a document entitled O.D. 20843, containing a suggested technique of fabrication. O.D. 20843 was introduced with the following preamble:

> 1.1 Purpose. This NAVWEPS Ordnance Data publication outlines instructions which are intended to serve as a guide for the fabrication and preparation of the rod bundle used on the warhead * * *.

While it is clear from the record, and the Board so found, that neither of the parties regarded O.D. 20843, or the drawings accompanying it, as mandatory in the same sense as other contract requirements,[10] at the same time, we infer that this data was supplied with the intention of delineating

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[9] The ballistic performance required of the warheads was contained in O.S. 11705. Paragraph 3.2 made applicable the requirements of specification MIL–P–16594, covering the manufacture of guided missile inert parts. Paragraph 3.31 stated that the requirements for static load were such that the warheads, when tested in accordance with paragraph 4.31, would withstand a specified load without incurring any permanent deformation or weld failures. Paragraph 4.31 provided that each warhead assembly was to be attached on a 20.240" diameter flange and would have to withstand a uniform load of 6500 pounds applied in a purely axial manner against a 17.125" diameter flange. Paragraph 3.33 specified that the weld hinge of the rod bundle should be capable of withstanding certain specified tensile loads.

[10] Drawings designated for use with O.D. 20843 bore the legend "Illustration Only—Not for Manufacture".

methods and designs which would produce a product acceptable to the government, if strictly followed by the contractor. Significantly, O.D. 20843 was entitled "Advisory Instructions for the Fabrication of the Rod Bundle * * *."

III. The Controversy

Plaintiff urges that because the government-furnished specifications and drawings enumerated above were defective it incurred additional costs within the purview of the "Changes" clause in the contract. The additional expenses claimed include (1) the costs associated with manufacturing an unnecessary first set of four preproduction samples, which were rejected, and (2) extra costs incurred in finally performing the contract in accordance with the more costly advisory welding specifications, when this did not produce a warhead which satisfied the contract's ballistic requirements any more readily than did the welding technique plaintiff used to fabricate the first set of preproduction samples.

Plaintiff relies upon our holding in *Hol-Gar Manufacturing Corp* v. *United States*, 175 Ct. Cl. 518, 360 F. 2d 634 (1966), hereinafter "*Hol-Gar*". In that case, a contractor sued to recover additional costs it incurred in attempting to perform a contract to manufacture electric generator sets in accordance with specifications defectively drawn by the government. A change order amending the specifications had later been issued and accepted by the contractor with a reservation of its right to submit a claim for extra costs incurred in having first attempted to perform under the original specifications. In deciding the case when it came to this court after the ASBCA had denied the contractor's claim, we held that where a change is required by reason of defective specifications or drawings for which the government is responsible, a contractor is entitled to an equitable adjustment to compensate not only for any extra costs occasioned by the change, but also for extra costs incurred in attempting to comply with the originally defective specifications.

We conclude, however, that plaintiff's reliance on our holding in *Hol-Gar* is misplaced. For reasons which follow, this

is so even though the facts here reveal that the government furnished defective specifications, and we deem a constructive change in the contract to have occurred when the ballistic test requirements were relaxed by the government to conform to the capability of the product to be manufactured in accordance with the existing specifications, both mandatory and advisory. And we are not unmindful of such cases as *LaCrosse Garment Mfg. Co.* v. *United States*, 193 Ct. Cl. 168, 432 F. 2d 1377 (1970); *L. W. Foster Sportswear Co.* v. *United States*, 186 Ct. Cl. 499, 405 F. 2d 1285 (1969), and cases therein cited, which stand for the proposition that a contractor is entitled to an equitable adjustment under the "Changes" clause for increased costs of performance *due* to defective specifications. But we have laid emphasis, in the preceding sentence, on the word *due* because of the three vital elements—(1) defective specifications, (2) causation, and (3) extra costs—in this case, as will appear, the element of causation is absent.

For purposes of analysis, we will examine plaintiff's claim (presumably grounded upon the constructive change mentioned above) in two separate segments, taking up pre-change additional costs first. These costs were the result of plaintiff's having produced an extra and perhaps unnecessary first set of four preproduction samples.

In *Hol-Gar*, pre-change extra costs were awarded which were the direct result of the contractor having explicitly followed defective specifications furnished by the government but which, even though conscientiously followed, produced an unacceptable result. In the case at hand, plaintiff ignored a portion of the technical material furnished by the government, that is to say certain of the advisory specifications, and elected to employ welding techniques of its own in fabricating the initial set of preproduction samples. We reason that in rejecting the teaching of the advisories plaintiff assumed the risk that its own techniques would not yield an acceptable result. (No doubt, in return for anticipating the assumption of the risk, plaintiff had been able to place itself in an advantageous bidding position in its fixed-price proposal because

the advisories were evidently more costly to follow than the method plaintiff had planned to pursue.)[11]

Thus, the critical factual premise supporting our holding in *Hol-Gar*, that the government's specifications were followed by the contractor without deviation, is not present in the case before us now. Plaintiff is not, therefore, entitled to reimbursement for its pre-change additional costs because such were incurred only as the direct and proximate result of plaintiff's attempt to produce in accordance with its own less costly techniques, rather than the government-furnished design advisories.

The ASBCA, in its second decision, also considered the risk-shifting effect of plaintiff's failure to first follow the advisories, and we are in agreement that:

> * * * appellant [plaintiff] was on notice of the potential need to follow them and, when it chose not to do so initially, it assumed the risk that its own production methods might not work.

The above-quoted paragraph is generally in accord with and supported by the *ratio decidendi* of several of our decisions. In *Austin Co.* v. *United States*, 161 Ct. Cl. 76, 314 F. 2d 518, *cert. denied*, 375 U.S. 830 (1963), we assumed that plaintiff's failure to perform was due solely to the fact that it was impossible to do so under the specifications. However, the latter were proposed by the plaintiff after it had reviewed defendant's specifications and found them unworkable. We held that plaintiff, having promised to perform under its own substituted specifications, fully assumed the risk of impossibility of performance. As the government was responsible for losses due to its own specifications if they were defective, the converse should apply to the plaintiff. *Accord*, *J. A. Maurer, Inc.* v. *United States*, 202 Ct. Cl. 813, 485 F. 2d 588 (1973);

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[11] As more fully appears below, by ignoring the advisory designs plaintiff also chose—as it had the contractual right to do—to fashion the contract into one of the "performance type", from one of the "design type". However, plaintiff thus became a guarantor that the finished products would perform in accordance with the contract's specified performance criteria. Therefore, the risk that the contract's ballistic requirements were impossible of performance became the burden of the contractor by its own concerted election. *Cf., Bethlehem Corp.* v. *United States*, 199 Ct. Cl. 247, 462 F. 2d 1400 (1972); *Austin Company* v. *United States*, 161 Ct. Cl. 76, 314 F. 2d 518, *cert. denied*, 375 U.S. 830 (1963).

Bethlehem Corp. v. *United States*, 199 Ct. Cl. 247, 462 F. 2d 1400 (1972).[12]

We turn now to the subject of post-change additional costs. It will be remembered that these allegedly resulted from the government's insistence that plaintiff fabricate in accordance with the more costly advisory design specifications, even after the performance requirements of the contract had been constructively relaxed when it became known that they could not have been consistently met with the use of the advisories.

We must reject plaintiff's argument that its eventual use of the advisories in fabricating the full number of warheads required by the contract called for an equitable adjustment. This we do because we cannot agree that the advisories were ever employed by plaintiff in a manner not contemplated by the parties *ab initio*. The advisories were all part and parcel of the contract from its inception.

Moreover, the record does not support plaintiff's conclusion that the government "insisted" on compliance with the advisories. Apparently, when the initial set of four preproduction samples was found unacceptable, *both* parties thought that if the advisory welding techniques had been used, the required ballistic performance might have been achieved. For that reason, plaintiff then elected to follow the advisories in producing its second set of preproduction samples. When this second set of samples was tested, it became clear to both plaintiff and the government that the ballistic specifications would never be met under the contract's original design specifications, both mandatory and advisory. The performance requirements were, therefore, necessarily relaxed. Plaintiff continued to perform the contract by fabricating the warheads in accordance with the advisories. We conclude not that the advisories were "insisted" upon, but that plaintiff sought by their use to transfer to the government the risk that, when finally manufactured, the product would not ade-

[12] It is noted that these three decisions involve default terminations by the government, while in the instant case the contract was completed after a constructive change was made in the performance specifications. This distinction is of little consequence in light of our purpose here. We borrow from these cases only the narrow lesson that where a contractor substitutes design specifications of its own for those of the government, it assumes the risk that they will not adequately perform.

quately perform even under the relaxed ballistic standards. This option, all along contractually available, evidently became plaintiff's safest course and, as such, its choice.

It must also be remembered that plaintiff was fully cognizant after the ballistic tests on the second set of four preproduction samples, and before the start of actual production under the contract, that the government stood ready to accept warhead units produced strictly in accordance with the advisories even if such were not capable of satisfying the original or modified ballistic requirements of the contract. It was with that in mind that plaintiff manufactured the warheads, the government accepted them, and the fixed price of the contract was paid.

Plaintiff, therefore, in effect urges us to grant it an equitable price adjustment for having produced in a manner not only permissible under the original design specifications and drawings, but suggested by them. It is plain that to do so would, as the ASBCA found, be contrary to both logic and the pertinent law. Simply stated, we find that the costs for which plaintiff seeks reimbursement were not extra costs incurred as a consequence of the constructive change made in the contract.

The Board, in its second decision, summarized the point thus:

> If the Government had not effectively changed the ballistic requirements so that the original requirements became immaterial, or if it had misled appellant into incurring extra costs in an impossible task while misrepresenting the ballistic test results, we would have a different case. Here appellant knew or should have known from the start that it might have to use the advisory specifications to achieve a successful result. We do not believe it is entitled to extra costs for having done just that after having tried its own methods and failed.

IV. Conclusion

Accordingly, for the above reasons, plaintiff's motion under Rule 141(b) is denied. Defendant's cross-motion for summary judgment (incorporated and reasserted in its Rule 150(d) cross-notice) is granted. Plaintiff's motion for summary

judgment (likewise incorporated and reasserted in its Rule 150(d) notice) is denied.

Counts III and IV of the petition are dismissed.

BENNETT, *Judge*, concurring in part and dissenting in part:

While I join in the balance of the court's opinion, I am unable to agree that plaintiff is not entitled to recover the costs it incurred in building the four rejected preproduction models. The court bases its holding for defendant here on the ground that plaintiff should have, but did not, follow certain advisory specifications, and so "in rejecting the teaching of the advisories plaintiff assumed the risk that its own techniques would not yield an acceptable result." The court, I think, misperceives the risk that plaintiff ran when it opted, in the first instance, for its own welding techniques over those found in the advisory specifications. Moreover, I think it does so precisely because it fails to appreciate the difference between the Government's design specifications, part of which were advisory, and the Government's performance specifications.

All are by now agreed that the performance specifications which plaintiff tried to meet when it built the first four preproduction models were impossible of attainment, even with the employment of the advisories' techniques. The parties stipulated this to be true and the board's opinion of February 21, 1975, page 13, although thinking this to be irrelevant, said in pertinent part:

> * * * it should now be clear that the specifications were defective in specifying ballistic requirements that could not be met consistently under either the mandatory or advisory specifications. * * *.

It is not true, as the court seems to be saying, that plaintiff assumed all conceivable risks that it would not be able to meet the performance specifications when it opted to disregard certain advisory design specifications. When it did the latter, plaintiff assumed the risk, and only the risk, that it would not meet performance specifications *possible* of performance. Plaintiff decidedly did not run the risk that it

would be impossible to comply with the performance specifications. Plaintiff's choice of welding techniques had no effect whatever on the performance requirements. Plaintiff cannot, within the precedents, be held to have assumed the risk of impossibility with respect to specifications unless it designed them [1] or else contractually agreed to assume the risk, neither of which was the case here. *J. A. Maurer, Inc.* v. *United States*, 202 Ct. Cl. 813, 485 F. 2d 588 (1973).

Based on the above, I think plaintiff is entitled to an equitable adjustment in the amount of its costs in constructing the original four preproduction models, and I dissent from the contrary holding of the court.

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543 F.2d 1306

CITIES SERVICE HELEX, INC. v. THE UNITED STATES

No. 138-75

NATIONAL HELIUM CORPORATION v. THE UNITED STATES

No. 158-75

[Decided October 20, 1976]

ON DEFENDANT'S AND PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

Contracts; breach; continued performance; waiver of breach; helium purchase by Government.—Plaintiffs challenge certain Government termination actions and nonpayment in connection with their 1961 22-year contracts to furnish helium to the Government. The Govern-

[1] The court's citations to *Bethlehem Corp.* v. *United States*, 199 Ct. Cl. 247, 462 F. 2d 1400 (1972), and *Austin Co.* v. *United States*, 161 Ct. Cl. 76, 314 F. 2d 518, *cert. denied*, 375 U.S. 830 (1963), are inapposite. In *Bethlehem*, the Government wrote the performance specifications in reliance on the contractor's statements regarding what was attainable; in *Austin*, the contractor itself drew up the performance specifications. Here, however, the contractor took no part in the creation of the performance specifications. It therefore simply does not follow from the cited cases that the risk of impossibility as to the end requirements (as distinguished from the design specifications) ever became plaintiff's responsibility. When plaintiff elected to ignore the advisories, it assumed only the risk that its design would not meet the Government's performance requirements.

Syllabus

ment was given no general right to terminate for its own convenience but did have the right to terminate in specified conditions. On January 26, 1971 Under Secretary Russell issued 60-day termination notices and statements of reasons. Plaintiffs protested the validity of the terminations, requested withdrawal thereof, and after Secretary Morton affirmed the terminations, National Helium filed suit in a Federal District Court challenging the legality of the action as contrary to the purpose and requirements of the National Environmental Policy Act of 1969 (NEPA) and other statutes, and requested an injunction prohibiting termination, a declaration that the Russell termination was invalid and that the contract remained in full force and effect unless and until defendant terminated it in full compliance with the contract terms and the provisions of relevant statutes. Cities Service, which had also protested the action and had reserved its right to pursue its legal remedies, joined National Helium's suit. On March 27, 1971 the District Court temporarily enjoined the Government from taking action leading to termination of the helium program and the contracts and ordered that the latter remain in full force and effect pending further court order. The Tenth Circuit affirmed on the ground that the injunction was proper because the Government failed to comply with NEPA. On February 2, 1973 Sec. Morton issued to each plaintiff a termination notice to be effective April 4, 1973 and a statement of reasons. The Government moved to dissolve the injunction, the District Court denied the motion, and subsequently after remand by the Tenth Circuit for consideration of the propriety of the Government's environmental impact statement the District Court found the statement inadequate and continued the injunction. In October 1973 the Tenth Circuit reversed, finding the statement sufficient under NEPA and remanding with directions to dismiss the action. On November 12, 1973 the Government shut in the pipelines furnishing helium, plaintiffs notifying the Government that this constituted material breaches of contracts. The District Court dissolved the injunction and dismissed the case on November 19, 1973. Until November 12, 1973 plaintiffs had tendered and the Government accepted helium but the latter only paid for helium delivered through June 1972. In the present suits plaintiffs claim entitlement to the contract price, plus interest, for the unpaid helium tendered and delivered through November 19, 1973 and damages for breaches as set forth. It is *held* that because plaintiffs failed to end the contracts before the Morton termination and continued performance, and because they affirmatively sought and accepted the benefits of the Government's continued performance, the contracts were still in effect at the time of the Morton termination on April 4, 1973. Since the Government admits liability to April 4, 1973, judgments are entered for plaintiffs for the contract price, plus interest, of the unpaid helium delivered to April 4, 1973, the amounts of recovery to be determined in further

Syllabus

proceedings. However, the question of the Government's post-April 4 liability cannot be disposed of at this time, entailing as it does interpretation of the injunction and its reversal, and an evaluation of the effect of these actions—in a suit which did not determine contract rights—on those rights now before this court for adjudication. Accordingly the cases are remanded to the Trial Division for further proceedings in accordance with this opinion.

Pleading and practice; summary judgment; partial summary judgment motion to dismiss.

[1] Although the court disapproves the use (before pre-trial) of partial summary judgment motions to dismiss segments of claims in order to narrow issues and limit discovery, where the relatively narrow legal questions presented have been fully briefed and the motion is not used by the movant to obtain direct rulings on discovery matters, the court will consider the motion in expectation of clarification of issues on which further proceedings must focus, saving of time and effort, and avoidance of undue complexity if deferred.

Courts ⇐ 470

Contracts; breach; waiver of breach.

[2] A material breach does not automatically and *ipso facto* end a contract. It merely gives the injured party the right to end the agreement; the injured party can choose between cancelling the contract and continuing it. If he decides to close the contract and so conducts himself, both parties are relieved of their further obligations and the injured party is entitled to damages to the end of the contract term (to put him in the position he would have occupied if the contract had been completed). If he elects to continue the contract, the obligations of both parties remain in force and the injured party may retain only a claim for damages for partial breach.

Contracts ⇐ 318, 324(1)

Contracts; breach; waiver of breach; election by conduct.

[3] Where a material breach of contract has occurred, this court has adopted the position that the injured party may itself continue performance in certain circumstances and yet reserve its right to claim material breach without the breaching party's assent.

Contracts ⇐ 321(1)

Contracts; breach; waiver of breach; election by conduct.

[4] Plaintiffs' election after material breach to continue to perform contracts for supply of helium to the United States, up until the Government gave notice of intent to close the pipelines, is manifested where plaintiffs failed to take any action or make any statement to end the contracts before Secretary Morton's termination, they continued to perform, insisted on continued Government performance and accepted that performance, and in response to Under

Syllabus

Secretary Russell's termination they promptly sued in the District Court to have the contracts declared in full force and effect and to have the Russell termination enjoined pending compliance with the National Environmental Policy Act of 1969 and other governing provisions. On these facts, the contracts—and the Government's right to terminate—remained in effect, regardless of any prior breach by the Government, and plaintiffs failed to put an end to the contracts for Government breach before the Government exercised its right to terminate.

United States ⟸ 72(8)

Contracts; breach; waiver of breach; rescission, right to.

[5] A right to cancel for material breach must ordinarily be exercised with reasonable promptness after discovery of the breach.

Contracts ⟸ 270(1)

Contracts; breach; waiver of breach.

[6] Although Sec. 1-207 of the Uniform Commercial Code provides that a party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved, where all of plaintiffs' actions are inconsistent with the reservation of a right to end the contracts for material breach, such as suing in the District Court to have the contracts declared in full force and effect, and where plaintiffs' express declarations of material breach came long after the acts complained of and after both parties continued performance, a prior general and undifferentiated reservation of rights is insufficient. The reservation must plainly and explicitly assert the right to claim material breach ending the contracts, unless adequate warning has otherwise been given.

Contracts ⟸ 262

Contracts; breach; waiver of breach.

[7] Where plaintiffs' course of action in response to the Russell termination caused (1) the Government's continued performance of the contracts despite its own decision to terminate, (2) the Government's payment of the full contract price for more than a year after termination was to have taken effect, and (3) the Government's repetition for the Morton termination of the steps needed to terminate the contracts, it would be unjust to allow plaintiffs to change their election to continue the contracts following defendant's breach.

United States ⟸ 72(8)

Contracts; breach; waiver of breach; pursuit of remedies.

[8] That the Uniform Commercial Code, Sec. 2-703, Comment 1, generally makes remedies cumulative and advocates flexibility in order to make the injured party whole after a material breach does not mean that it sanctions the injured party's pursuit of one course (continuation of the contract) for years, and then a complete turn-

about (cancellation) when the initial course proves only partially beneficial.

Contracts ⇐ 262

Contracts; performance; continued performance after breach; pendency of litigation or contract dispute.

[9] Even if plaintiffs' continued performance after material breach was compelled by injunction and contract provisions requiring performance during pendency of a contract dispute, since plaintiffs forced the Government to continue performance against its will and received advantages therefrom, they had, at the least, the duty to take appropriate action to claim material breach and keep alive that claim, for instance by explicit reservation of the right to consider the contract at an end or by filing suit for breach with explicit notification to the Government that plaintiffs would continue performance for specified reasons.

United States ⇐ 74(3)

Charles C. Baker, attorney of record, for Cities Service Helex, Inc. *James M. Sturdivant* and *C. A. Coulter*, of Counsel.

Robert L. Ackerly, attorney of record, for National Helium Corporation. *Raymond S. E. Pushkar*, *Harvey G. Sherzer*, *D. Joe Smith*, *Jr.*, *Sellers*, *Conner & Cuneo*, and *Wendell J. Doggett*, of counsel.

Edward J. Friedlander, with whom was *Assistant Attorney General Rex E. Lee*, for defendant. *John D. Trezise*, of counsel.

Before COWEN, *Chief Judge*, DURFEE, *Senior Judge*, DAVIS, SKELTON, NICHOLS, KUNZIG and BENNETT, *Judges*, *en banc*.

DAVIS, *Judge*, delivered the opinion of the court:

In 1960 Congress enacted Helium Act Amendments giving the Secretary of the Interior broad authority to establish a long-range helium conservation program. Four 22-year contracts providing for the Government's purchase of helium from private contractors formed the major components of this program. The court considered one of those contracts, and that contractor's claim of material breach, in *Northern Helex Co.* v. *United States*, 197 Ct. Cl. 118, 455 F. 2d 546 (1972), and 207 Ct. Cl. 862, 524 F. 2d 707 (1975), *cert. denied*,

429 U.S. 866 (1976).[1] Two of the other three contractors are now before us challenging certain government termination actions and nonpayment that occurred after the material breach for which Northern Helex brought suit.[2] However, only part of these two cases is to be decided at this time. Whatever our ruling, much remains to be litigated.

No. 158-75, National Helium Corp.

National Helium was one of the four helium conservation contractors. Its 1961 agreement required it to construct a helium extraction facility and to tender to the Government the helium produced, and in turn called upon the Government to pay for all helium tendered, up to an annual maximum of $15,200,000.[3] This contract, like the other three, permitted termination prior to the end of the 22-year term only on specified grounds; the Government was given no general right to terminate for its own convenience.

On January 26, 1971, Under Secretary of the Interior Russell issued to each of the four helium contractors a 60-day notice of termination, accompanied by a statement of reasons, said to be pursuant to the contract's termination provision. National Helium's president responded with a letter of February 19, 1971, declaring that "we are unable to agree that the purported termination is valid," "respectfully suggest[ing] that [the] determinations and the purported termination are ineffective," and urging Secretary of the Interior Morton "to remove the cloud of the purported termination notice by officially withdrawing the same." On March 11, Secretary Morton replied that the decision to terminate was final and would take effect on March 28. On March 17, National Helium filed suit challenging the action

[1] The *Northern Helex* opinions contain more detailed descriptions of the helium conservation program. *See also Northern Natural Gas Co.* v. *Grounds*, 292 F. Supp. 619, 646–59 (D. Kan. 1968), *modified*, 441 F. 2d 704 (10th Cir.), *cert. denied*, 404 U.S. 951 (1971). 404 U.S. 1063 (1972); *National Helium Corp.* v. *Morton*, 361 F. Supp. 78, 83–88 (D. Kan.), *rev'd*, 486 F. 2d 995 (10th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974).

[2] Because the facts and issues raised by the two present plaintiffs are virtually identical, the cases were argued in tandem and are decided together.

[3] The contract gave the Government the option to purchase helium in excess of this annual maximum. During the years here involved, the Government declined to exercise this option.

in federal district court in Kansas.[4] *See National Helium Corp.* v. *Morton*, 326 F. Supp. 151, 152 (D. Kan.), *aff'd* 455 F. 2d 650 (10th Cir. 1971).

The District Court complaint charged that the termination and the statement of reasons were "factually erroneous, arbitrary and capricious, an abuse of discretion, and otherwise illegal and contrary to the purposes and requirements of the National Helium Act, as amended, the National Environmental Policy Act of 1969 [NEPA], and the Administrative Procedure Act."[5] National Helium prayed for an injunction prohibiting the Government from terminating its contract, and the helium program, without first holding public hearings and for a declaration that the Russell termination was invalid and that the contract remained in full force and effect "unless and until the defendants terminate the contract in full compliance with the terms of the contract, the provisions of the 1960 Amendments to the National Helium Act, the National Environmental Policy Act of 1969, and the Administrative Procedure Act."[6] On March 27, 1971, one day before the operative date of the Russell termination, the District Court temporarily enjoined the Government from taking any action leading to the termination of the helium program and the contracts, and ordered that the contracts remain in full force and effect pending further court order. *National Helium Corp.* v. *Morton*, 326 F. Supp. 151, 158 (D. Kan. 1971). The Government appealed but the Tenth Circuit affirmed on the ground that the injunction was proper because of the Government's failure to comply with NEPA. *National Helium Corp.* v. *Morton*, 455 F. 2d 650, 653–54, 657 (10th Cir. 1971).[7]

[4] Two other helium contractors, plaintiff Cities Service Helex and Phillips Petroleum, subsequently joined National Helium. The fourth contractor, Northern Helex, had filed suit in the Court of Claims before the Russell termination and did not participate in the District Court suit challenging it. *See Northern Helex Co.* v. *United States*, *supra*.

[5] In paragraph 22 of the petition, National Helium specifically averred that the court could review, under section 10 of the APA, the contractual validity of the Russell termination.

[6] In a letter dated July 20, 1971, after the District Court's initial decision, National Helium reiterated what it described as its litigation position that the Russell termination was "ineffective."

[7] The circuit court made clear that it viewed the contractual validity of the termination as beyond the scope of the court's review and rested its affirmation on NEPA. *Id. See also National Helium Corp.* v. *Morton*, 486 F. 2d 995, 1000 (10th Cir. 1973), *cert denied*, 416 U.S. 993 (1974).

In May 1972 a draft environmental impact statement was ready for comment and announced in the Federal Register. The final statement was issued in November 1972. In December, the Government moved to dissolve the injunction. As summarized in the District Court's mid-January order denying that motion, the Government informed the court that all necessary legal and administrative steps for proper termination had been completed but that the Government thought the injunction precluded it from terminating the contract. Explaining that the injunction had affected only the actions previously before the court and was not intended to restrict subsequent administrative action, the District Court ruled that the motion was premature because the sufficiency of the Government's actions would not be justiciable until the Government actually decided to terminate. On February 2, 1973, Secretary Morton issued the termination notice and statement of reasons referred to as the Morton termination, to be effective April 4, 1973. The Morton termination purported to stand on its own feet but also referred to the reasons for the Russell termination as sound.

The Government then renewed its motion to dissolve the injunction, which the District Court again denied. The Government appealed. The Tenth Circuit declined to rule on the appeal at that stage but noted that the District Court's review of the impact statement should be on the basis of the administrative record, not by trial de novo, and remanded for trial "forthwith" on the propriety of the environmental impact statement.[8] In June 1973 the District Court found the impact statement inadequate and continued the injunction. *National Helium Corp.* v. *Morton*, 361 F. Supp. 78, 97–108 (D. Kan. 1973). The Tenth Circuit, in October 1973, reversed, finding the impact statement to be sufficient, and remanded with directions to dismiss the action. *National Helium Corp.* v. *Morton*, 486 F. 2d 995 (10th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974).

By letter of November 2, 1973, the Acting Secretary of the Interior informed National Helium that, according to official advice, the Tenth Circuit's mandate was to issue on Novem-

[8] The Court of Appeals expressly retained the issue of the continuing validity of the preliminary injunction.

ber 12 and the Government planned on that date to shut in the pipeline through which it received plaintiff's helium, unless the company wished to deliver helium for storage for its own account. Plaintiff answered on November 7 that it had no desire to deliver helium for its own account, that the prior termination notices had expired, and that it would regard the closing of the pipeline "as an act of material breach of contract." The Government did close the pipeline on November 12 and accepted no helium thereafter. The injunction was dissolved and the case dismissed by the District Court on November 19. The dismissal order was entered "[i]n accordance with the mandate of the Court of Appeals filed herein on November 13, 1973, and that Court's directive that the decision to terminate should be carried out without delay."

Until November 12, through almost the entire life of the injunction and the District Court suit, the plaintiff tendered and the Government accepted helium, though because of lack of appropriations the Government did not pay for helium delivered after the end of June 1972 (despite plaintiff's submission of regular invoices showing the amounts claimed to be due under the contract).

Plaintiff filed suit here a year and a half later, on May 12, 1975. In the first of three counts, it claims entitlement to the contract price, plus interest as provided by the contract, for helium delivered and tendered from July 1, 1972, through November 19, 1973, the date of the District Court's dissolution of the injunction. Count two seeks damages (based on the Government's maximum annual obligation and quantity of helium to be delivered to the end of the contract term in 1983) for the Government's material breach of failing to pay for helium delivered and tendered from July 1972 to November 1973. The damages requested in count three are the same as those in count two; however, the material breach stated is the "[t]ermination action effected by virtue of such notices [the allegedly invalid Russell and Morton termination notices] and by defendant's subsequent closing of the valve and shut-in of the pipeline." The amount sought is $171,572,603.20, plus contract interest on a portion, less any opera-

tional cost savings resulting from the cessation of helium operations.

No. 138-75, Cities Service Helex, Inc.[9]

Cities Service's 1961 helium conservation contract with the Government, which carried a somewhat lower annual ceiling on the Government's obligation than National Helium's ($9,100,000 per fiscal year compared to National Helium's $15,200,000),[10] was one of the contracts covered by the Russell termination of January 26, 1971. The president of Cities Service protested by letter of February 19, 1971, that that action was "based on erroneous facts," "contrary to the national interest," and "defective." [11] Cities Service urged Secretary Morton to rescind the notice and "reserve[d] its rights to pursue its legal remedies in this matter." After receiving Secretary Morton's March 11 affirmation of the decision to terminate, the company joined National Helium's District Court suit.

Cities Service's complaint as plaintiff-intervenor closely paralleled National Helium's pleading and requested a preliminary injunction, and either a permanent injunction, or a declaration (a) of the invalidity of the Russell termination and (b) of the continued force of the contract. After the District Court granted the preliminary injunction, Cities Service wrote again to government officials: "It is the position of Cities Service Helex, Inc. that the contract remains in force and effect." Subsequently, as already pointed out, the Tenth Circuit affirmed the issuance of the preliminary injunction.

Events proceeded as they did in *National Helium*, *supra*. The Government took steps to comply with NEPA, tried to have the injunction dissolved, issued the Morton termination notice, and continued its litigation efforts, which were finally

[9] The significant facts of this case can be stated more briefly because most are shared with *National Helium* and have already been detailed.

[10] This contract, too, gave the Government the option to purchase amounts in excess of the annual limitation, an option which the Government declined to exercise during the pertinent years.

[11] In a letter dated March 3, 1971, directing several questions to Secretary Morton, the Cities Service president again stated the company's position that the termination notice was invalid and any basis for termination nonexistent.

successful in October 1973, when the Court of Appeals held the environmental impact statement adequate and remanded to the District Court for dissolution of the injunction and for dismissal. Also as in *National Helium*, the plaintiff continuously tendered helium and the Government accepted it until November 12, 1973, but the Government paid only for the helium delivered through June 1972. By letter of November 9, 1973, Cities Service reacted to the Government's November 2 notice of intent to shut the pipeline as follows: "You are advised that your stated intention to 'shut-in the pipeline' * * * constitutes a material breach of contract and that appropriate action for damages for such breach will be instituted if you persist in such action." The Government closed the pipeline on November 12; the Circuit's mandate issued on November 13; and the District Court dissolved the injunction and dismissed the suit on November 19, 1973.

Cities Service filed its petition here on April 24, 1975. It sets forth two causes of action, one alleging breaches of contract and the other seeking indemnification for amounts it may have to pay to third parties. Only segments of the first cause concern us now. In it, Cities Service delineates four material breaches: the Russell termination of January 1971; the Government's nonpayment for helium delivered from July 1972 through November 12, 1973; the Morton termination of February 1973; and the shut-in of the pipeline on November 12. Plaintiff seeks a total of $101,557,041.51, with adjustment for interest as provided by the contract and discounted to present value but without adjustment for operational cost savings; Cities Service claims that, because its facility is an integrated one which it cannot cease to operate, it can achieve no cost savings to be deducted.

I

The Government's Motions for Partial Summary Judgment

In each case the Government has moved for *partial* summary judgment to preclude the plaintiff from litigating, as independent material breaches ending the contract, any actions by the Government antedating the Morton termination (February–April 1973). The Government asks us to

dismiss the petitions to the extent that they state claims of total breach prior to that termination. The plaintiffs oppose but have not cross-moved on this aspect of the cases.

A.

This statement of the requested relief suggests a threshold hurdle. We are not sure that the Government has stated proper motions for partial summary judgment.[12] The court has recently stressed that it disapproves the use (before pretrial) of partial summary judgment motions to dismiss segments of claims in order to narrow issues and limit discovery. *Decca Ltd.* v. *United States*, 204 Ct. Cl. 907 (1974). Yet the Government may be trying to so use its motions here, at least to some extent. Granting of the motions will not result in the dismissal of either petition as a whole, or of any entire cause of action. It is difficult to find specific claims that will be dismissed as a whole; Cities Service states only one alleged material breach completely antedating the Morton termination, and National Helium alleges no pre-Morton-termination material breach as a separate claim.[13] Further, the Government's papers indicate some interest in using summary judgment as an evidentiary tool when it describes its difficulties in resisting discovery of documents relating to the Russell termination and urges the court to issue, with its decision on the summary judgment motions, guidelines limiting proof addressed to the Russell termination. However, at oral argument government counsel disavowed any effort to use the present motions to obtain direct rulings on discovery matters or on the relationship, if any, between the Russell and Morton terminations. We reemphasize the views expressed in *Decca Ltd.*, *supra*, but have decided in these circumstances to pass on the merits of the motions. The parties have fully briefed and argued the relatively narrow legal questions presented, the resolution of which does not in our view call for further factual ventilation, and which will probably clarify the issues on which the further proceedings must focus. It may well save time and effort, and avoid undue complexity, to

[12] Plaintiffs deny that the motions are proper.

[13] In its petition, National Helium groups the two termination notices and the shut-in of the pipeline as one material breach claim.

confront at this time, instead of by-passing, the problems raised by the defendant's motions.

B.

The Government's arguments are suggestive of waiver, election of remedies, and estoppel; [14] the thrust of the motions is that the plaintiffs cannot now litigate pre-Morton-termination actions as material breaches ending the contracts because they insisted on treating, and that the Government treat, their contracts as in full force and effect until long after the Morton termination—and thereby affirmatively kept the contracts and the Government's contractual right to terminate alive to the time of that termination. The plaintiffs counter that the Government had materially breached, and thereby ended, the contracts before the Morton termination so that the Government's right to terminate no longer existed in February–April 1973.[15]

A material breach does not automatically and *ipso facto* end a contract. It merely gives the injured party the right to end the agreement; the injured party can choose between canceling the contract and continuing it. If he decides to close the contract and so conducts himself, both parties are relieved of their further obligations and the injured party is entitled to damages to the end of the contract term (to put him in the position he would have occupied if the contract had been completed). If he elects instead to continue the contract, the

[14] As noted by the plaintiffs, the Government does not very explicitly label its theory. However, the courts and commentators have been similarly lax and imprecise in this area, so we cannot view the Government's failing with great alarm. One problem might be the Government's failure to plead waiver, election, or estoppel as an affirmative defense. However, since the plaintiffs have ably and thoroughly responded to the Government's arguments, showing no prejudice from the injection of the issue at this stage, and all parties have exhaustively treated it, we will consider the defense on the merits. *Cf.* Ct. Cl. R. 39(b); *Erickson* v. *United States*, 159 Ct. Cl. 202, 210, 309 F. 2d 760, 764 (1962).

[15] If the plaintiffs may litigate pre-Morton-termination actions as independent material breaches and those acts are determined to have been material breaches ending the contracts, plaintiffs will be entitled to contract damages to the end of the contract terms in 1983, regardless of whether contract grounds for termination existed in 1973 when the Morton termination issued. If, however, they are barred from treating those prior acts as material breaches ending the contracts, the validity and effectiveness of the Morton termination—under the contract—will have to be decided. The plaintiffs will be entitled to contract damages to 1983 only if the Morton termination (followed by the shutting of the pipeline) is found to have been invalid or ineffective.

obligations of both parties remain in force and the injured party may retain only a claim for damages for partial breach.[16] *See generally* 5 S. WILLISTON, CONTRACTS §§ 683–88 (3d ed. W. Jaeger 1961); RESTATEMENT OF CONTRACTS §§ 317, 309–10 (1932); 17 AM. JUR. 2d *Contracts* §§ 446–47, 489, 503, 510 (1964); *Acme Process Equip. Co.* v. *United States*, 171 Ct. Cl. 324, 334–37, 347 F. 2d 509, 515–16 (1965), *rev'd on other grounds*, 385 U.S. 138 (1966); *Airco, Inc.* v. *United States*, 205 Ct. Cl. 493, 497–99, 504 F. 2d 1133, 1135–37 (1974); *DeVito* v. *United States*, 188 Ct. Cl. 979, 990–91, 413 F. 2d 1147, 1153–54 (1969); *Ling-Temco-Vought, Inc.* v. *United States*, 201 Ct. Cl. 135, 144–50, 475 F. 2d 630, 636–39 (1973); *Northern Helex Co.* v. *United States*, 197 Ct. Cl. 118, 125–26, 455 F.2d 546, 551 (1972).

Under strict formulations of the election doctrine, any act indicating an intent to continue the contract is an election, and election to continue may occur simply by failure of the injured party to take action to end the agreement within a reasonable time after becoming aware of the facts. Under that view, if performance continues and is accepted, the right to end the contract cannot be preserved even by explicit expression of intent; any inconsistent act results in the loss of the right, unless the other party assents to its retention by the aggrieved party.[17] 5 S. WILLISTON, *supra*, §§ 683–85;[18] 17 AM. JUR. 2d, *supra*, §§ 447, 510. The continued acceptance of benefits under the contract is the most common and clearest case of election by conduct. *See* 5 S. WILLISTON, *supra*, § 687; 17 AM. JUR. 2d, *supra*, §§ 447, 489.

As the plaintiffs stress, some courts and commentators and the Uniform Commercial Code have modified various aspects of this strict view. In *Northern Helex Co.* v. *United States*, 197 Ct. Cl. 118, 455 F. 2d 546 (1972), the court adopted the

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[16] An election to continue the contract is frequently called a waiver of the material breach.

[17] This strict view was probably born of the courts' distaste for forfeiture and the harshness of cancellation, and the belief that cancellation had to meet the strictest requirements of fairness and timeliness. *Cf. Acme Process Equip. Co.* v. *United States, supra; H. N. Bailey & Associates* v. *United States*, 196 Ct. Cl. 156, 163–64, 449 F. 2d 387, 391 (1971).

[18] Professor Williston would not condition cancellation on the injured party's knowledge of the facts if the circumstances have materially changed or the breaching party has justifiably changed his position in reliance on the aggrieved party's inaction. *Id.* § 685.

position that the injured party may itself continue performance in certain circumstances and yet reserve its right to claim material breach without the breaching party's assent. *Id.* at 129–30, 455 F. 2d at 553; *see* UNIFORM COMMERCIAL CODE § 1–207. Some courts have shared Professor Corbin's view that an election should not be conclusive unless facts giving rise to an estoppel exist; either the breaching party must have changed his position in reliance on the injured party's failure to cancel or the injured party's conduct must be such that it would be unjust to allow him to change his position. 5A A. CORBIN, CONTRACTS § 1220 (1964); *Western Transmission Corp.* v. *Colorado Mainline, Inc.*, 376 F. 2d 470, 472 (10th Cir. 1967); *see United States* v. *Chichester*, 312 F. 2d 275, 282 (9th Cir. 1963); 5 S. WILLISTON, *supra*, § 686, at 289–91; *cf. Ling-Temco-Vought, Inc.* v. *United States*, *supra* at 145–46, 475 F. 2d at 636–37 (court stressed extra expense incurred by Government); *DeVito* v. *United States*, *supra* (elements of waiver of default in delivery include reliance and continued performance of delinquent party). The authors of the Uniform Commercial Code have also rejected the mechanical application of the doctrine of election of remedies: "Whether the pursuit of one remedy bars another depends entirely on the facts of the individual case." UNIFORM COMMERCIAL CODE § 2–703, Comment 1.

C.

Under any of these theories, the plaintiffs must be deemed to have elected to continue, not to end, their contracts, at least to the time of the Morton termination.

1. Clearly under the strict election doctrine, they kept the contracts and all obligations and rights under them alive until after that government termination. Not only did they fail to take any action or make any statement to end the contracts before that time,[19] but they also continued their own per-

[19] It should be emphasized that all of plaintiffs' pre-Morton characterizations of the Russell termination stressed that it was invalid and ineffective, *i.e.*, that it should be disregarded as inoperative. Insofar as plaintiffs may have implied that that termination amounted to a breach of contract, they never said or implied that it was a material breach ending the entire contract. They were content, indeed insisted, that the remedy be the disregarding of the Russell termination and the continuance of the contract. *See also* note 22, *infra*.

formance, insisted on continued government performance, and accepted that government performance.[20] Above all, in response to the proposed Russell termination, they promptly sued in the District Court to have the contracts declared in full force and effect because of the contractual invalidity of that termination as well as to have that termination enjoined pending compliance with NEPA and other statutes. They specifically sought to force the Government to continue performance and succeeded in that effort.[21] Every action taken by plaintiffs, until the Government threatened to and did shut in the pipelines, was directed toward keeping the contracts fully alive—and they prevailed in that effort with the help of the District Court. Only after the Government gave notice of its intent to close the pipeline valves in November 1973, nine months after the Morton notice (February 1973), did the plaintiffs openly claim material breach.[22]

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[20] They accepted full government performance, including payment, with respect to helium delivered prior to July 1972, and demanded full performance, by submitting regular bills for amounts due under the contract, with respect to helium delivered and accepted but not paid for by the Government after July 1, 1972.

[21] The complaints of both plaintiffs in the District Court sought an injunction against the Government's termination of the respective contracts, and a declaration that the contract "remain in full force and effect, preliminarily and permanently," until proper proceedings were held to terminate it in accordance with contractual and statutory requirements.

The District Court, affirmed by the Court of Appeals, ordered that (a) the government defendants were enjoined from taking any action leading to the termination of the National Helium Program "and the implementing Contracts" [giving the numbers of the three contracts involved in that suit, including plaintiffs' contracts] and (b) "that such contracts shall be continued and remain in full force and effect pending further order of this Court." *National Helium Corp.* v. *Morton*, *supra*, 326 F. Supp. at 158.

[22] Even then they claimed material breach only with respect to the closing of the pipeline. Their explicit claims of material breach in the fall of 1973 provide a sharp contrast to their labeling of the Government's earlier termination as "ineffective," and strengthen our interpretation of their prior letters as statements that the contracts remained in effect after those terminations. *See* note 19, *supra*.

Indeed, in one letter written shortly after the District Court injunction first issued, Cities Service stated explicitly that in its view the contract remained in force and effect. Cities Service now argues that we should read this remark in conjunction with the preceding paragraph of the letter noting the injunction; it is said that the remark meant that the contract remained in force and effect only because of the injunction. The letter, however, did appear to separate the two thoughts and paired the "remains in force" statement with the following sentence: "If, however, it is ultimately determined that the termination is effective, * * *." Especially when considered with the plaintiff's previous letters and its District Court complaint (*see* note 21, *supra*), this "in force and effect" declaration was broader than a statement of the temporary effect of

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On these facts the cases fit squarely within this court's prior decisions holding that a contract—and the Government's right to terminate—remains in effect, regardless of any prior breach by the Government, where the contractor fails to put an end to the contract for government breach before the Government exercises its right to terminate. *Airco, Inc.* v. *United States*, 205 Ct. Cl. 493, 499, 504 F. 2d 1133, 1136–37 (1974); *William Green Constr. Co.* v. *United States*, 201 Ct. Cl. 616, 625, 477 F. 2d 930, 936 (1973), *cert. denied*, 417 U.S. 909 (1974); *Nolan Bros., Inc.* v. *United States*, 186 Ct. Cl. 602, 606, 609 n. 5, 405 F. 2d 1250, 1253, 1255 n. 5 (1969). The plaintiffs' claims of pre-Morton-termination breaches also fall under our holding in *Acme Process Equip. Co.* v. *United States*, 171 Ct. Cl. 324, 347 F. 2d 509 (1965), *rev'd on other grounds*, 385 U.S. 138 (1966), that a right to cancel for material breach must be exercised with reasonable promptness after discovery of the breach. *Id.* at 335, 337, 347 F. 2d at 515, 516; *accord*, *DeVito* v. *United States*, 188 Ct. Cl. 979, 990–91, 413 F. 2d 1147, 1153–54 (1969); *Airco, Inc.* v. *United States*, *supra* at 497, 504 F. 2d at 1135; *cf. Companhia Atlantica* v. *United States*, 148 Ct. Cl. 71, 78, 180 F. Supp. 342, 346–47, *cert. denied*, 364 U.S. 862 (1960) (Government could not awaken a "sleeper," an old material breach on which it had not acted, to justify cancellation made on an improper ground).

2. Even under the modified views of the permissible methods of handling a material breach, these plaintiffs cannot claim that they ended their contracts prior to the Morton termination. The position adopted in *Northern Helex Co.* v. *United States*, 197 Ct. Cl. 118, 455 F. 2d 546 (1972), allowed a plaintiff to claim a material, contract-ending, breach—despite having continued performance—only in the context of that plaintiff's explicit reservations of material breach claims, explanations in advance of the reasons for its continued performance, prompt suit before the Government took

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the preliminary injunction. It summarized Cities Service's ultimate position and view of the proper outcome of the litigation. In any event, both Cities Service and National Helium deliberately sought the injunction which kept the contracts fully alive. As discussed *infra*, the contractors must take the necessary consequences of their own chosen course.

any action to terminate, the lack of prejudice to the Government, and other special factors. *Id.; see Ling-Temco-Vought, Inc.* v. *United States*, 201 Ct. Cl. 135, 146–47, 475 F. 2d 630, 637 (1973). These facts, which readily distinguish *Northern Helex* from the present suits, brought Northern Helex within the rule of Uniform Commercial Code section 1–207: "A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved." *See* 197 Ct. Cl. at 128–30, 455 F. 2d at 552–53. In the present case continued performance on both sides for a long period of time and without any explicit warning that claims of material breach would some day be asserted [23] went far beyond the reasonable commercial judgment that we found in *Northern Helex*. *See* 197 Ct. Cl. at 129, 455 F. 2d at 553.

Moreover, we have here much more than mere continuance of performance by the injured party, leaving it open to the defaulter whether or not to continue its own performance. Both plaintiffs set out to force the Government to perform fully, and instituted suit in the District Court for that very purpose. In this they succeeded for the entire period with which we are now concerned. The District Court suit, and the order issued by that tribunal (and continued in effect) at plaintiffs' instance, was wholly and directly opposed to their

[23] As we have pointed out, neither National Helium nor Cities Service explicitly reserved the right to claim material breach, ending the contract, at any time before November 1973. Cities Service did state in its first letter responding to the Russell termination notice that the company reserved its right to pursue its legal remedies in the matter (without further specification). That reservation was followed almost immediately by plaintiff's participation in the District Court suit and was given meaning by that and other acts, all directed toward continuation of the contract. At least where all of a plaintiff's actions are inconsistent with the reservation of a right to end a contract for material breach, and where plaintiff's express declaration of material breach comes long after the acts complained of and after the parties have both continued performance, a prior general and undifferentiated reservation of rights is insufficient; the reservation must plainly and explicitly assert the right to claim material breach ending the contract, unless adequate warning has otherwise been given. *Cf. Robinson* v. *Jonathan Logan Financial*, 277 A. 2d 115 (D.C. Ct. App. 1971) (informing seller that buyer has problem with shipment is far short of required seasonable notification of rejection); *Ling-Temco-Vought, Inc.* v. *United States, supra* at 149, 475 F. 2d at 638 (plaintiff's reservation of right to claim material breach would have enabled Government to evaluate and protect its position).

present position that the companies had already put the contracts to an end. The Kansas action sought the polar antithesis of an ending of the contract because of the Russell termination; it asked for the disregarding of that notice and the continuation of the agreement in full force and effect despite the Russell termination. We cannot understand how, after a material breach, the injured contractor can continue its own performance as well as compel the other side to perform, and still, at the same time, claim that it ended the contract upon that material breach. The inconsistency between the actual course of conduct and the verbal claim is too stark. The contemporaneous action belies the hollow words.[24]

3. Plaintiffs fare no better under the Corbin view that an election is binding if the breaching party changes his position in reliance, or if the injured party's conduct has been such that it would be unjust to allow him to change. Both conditions exist here. Plaintiffs' course of action in response to the Russell termination caused (i) the Government's continued performance of the contracts despite its own decision to terminate,[25] (ii) the Government's payment of the full contract price for more than a year after the termination was to have taken effect,[26] and (iii) the Government's repetition for the Morton termination of the steps needed to terminate the contract. The plaintiffs accepted the benefits accruing from

[24] In actual fact these cases, as we point out, are a fortiori because plaintiffs did not even speak the words of material breach at the time they commenced and carried on the District Court litigation through the second appeal. An analogy may be drawn to the rule of U.C.C. Section 2-611 which declares that, in the case of an anticipatory repudiation, the repudiating party can retract his repudiation "unless the aggrieved party has since the repudiation cancelled or materially changed his position or otherwise indicated that he considers the repudiation final." By pursuing and winning their District Court suit, plaintiffs in effect forced the Government to retract its alleged repudiation (*i.e.* the Russell termination, if considered a repudiation). *See also* notes 25, 34 *infra*.

[25] Cf. 5A A. CORBIN, *supra*, § 1222, at 474–76 (performance, even though under compulsion of a court order, prevents breach from being total). *See also* note 24, *supra*, and accompanying text.

[26] The Government's liability probably would have been less than the full contract price even if the plaintiffs had treated the Russell termination as a material breach and had won judgment in this court on that basis. *See Northern Helex Co. v. United States*, *supra*, 207 Ct. Cl. 862, 524 F. 2d 707 (1975). The Government's liability certainly would have been less if this court had determined that Under Secretary Russell's action was contractually valid.

their chosen course of action [27] and did not suggest to the Government, until long after the Morton termination, that they would hold the Government liable to the end of the contract term for material breaches occurring prior to that termination. It would be inequitable to allow the plaintiffs to say now that the contracts were no longer in force in February–April 1973.[28] More than that, the bizarre result of accepting the plaintiffs' theory is they would have that right even if Secretary Morton had decided in February 1973 not to terminate but to continue the contracts fully (and the injunction had been dissolved for that reason); it is inconceivable that, at that time, the companies could disinter the pre-1973 occurrences as a basis for claiming a material breach if economics seemed to them to dictate that a lawsuit for damages would be more advantageous then continuance of the contracts.

4. The same facts also bar the plaintiffs under the Uniform Commercial Code's admonition: "Whether the pursuit of one remedy bars another depends entirely on the facts of the individual case." Section 2–703, Comment 1. That the U.C.C. generally makes remedies cumulative and advocates flexibility in order to make the injured party whole does not mean that it sanctions the injured party's pursuit of one course (continuation of the contract) for years, and then a complete turnabout (cancellation) when the initial course proves only partially beneficial.[29] On the contrary, the paradigmatic case for invoking an election of remedy would seem to be the present situation in which the aggrieved contractors successfully sought to impose legal force on their opposite number to continue full performance. That the U.C.C. does not

[27] "The acceptance of a settlement or of any substantial advantage, under and by virtue of a claim of one alternative remedy, will bar a subsequent claim to a different remedy." 5A A. CORBIN, *supra*, § 1220, at 469 n. 40.

[28] It would be especially inequitable to allow the plaintiffs to claim, as they do, that the Government's contract right to terminate had ended while the plaintiffs' contract right to payment of the full contract price continued.

[29] The U.C.C. does require prompt and specific action to preserve rights and remedies in various situations and suggests that affirmative action is necessary when a seller wishes to cancel for the buyer's breach. *See, e.g.*, UNIFORM COMMERCIAL CODE §§ 2–602(1), –606(1)(b), –607(3), –608(2), –616, –703; 2 R. ANDERSON, UNIFORM COMMERCIAL CODE § 2–703:35 (1971) (when seller elects to cancel, it is clear that he should manifest intention to do so; Code does not establish method of cancellation, so pre-Code law governs).

entirely rule out election is shown by a provision which affirmatively favors the application of election in certain circumstances, as well as the continuation of a contract in the absence of clear and prompt cancellation.[30]

D.

The plaintiffs protest that reference to the District Court litigation improperly penalizes them for acting in the public interest to compel the Government's compliance with NEPA. They suggest that this court treat their injunction suit as if it had actually been brought by unrelated parties. Even if we accepted the fiction that the plaintiffs in the injunction suit were there acting solely in the public interest,[31] we would not deny the Government's motions for summary judgment. The facts would remain that these contractors continued performance, accepted the benefits of continued performance by the Government under a decree which expressly continued the contracts in full force and effect, and did nothing to claim (or end the contracts for) material breach before the Government issued the Morton termination. We cannot blink away the fact that, whatever the hats they wore, plaintiffs deliber-

[30] *See* UNIFORM COMMERCIAL CODE § 2-612(3); id., Comments 6, 7. Section 2-612(3) states that when a default as to one installment of an installment contract substantially impairs the value of the whole, the default is a breach of the whole and justifies cancellation (*see also* §§ 2-703, -711). However, the aggrieved party reinstates the contract if he accepts the installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments. Official Comments 6 and 7 make clear that the rule established is intended to continue contracts in the absence of overt cancellation and applies both to seller and buyer. Comment 7 stresses notification within a reasonable time, evaluated under the good faith standard.

[31] The argument that the plaintiffs acted solely in the public interest overlooks two facets of the District Court litigation. The plaintiffs petitioned for more than review under NEPA and an injunction to compel compliance with NEPA; they attempted to obtain a ruling that the Russell termination was contractually invalid and succeeded in obtaining a declaratory judgment pronouncing the contracts in full force and effect. *See* notes 5, 21, *supra*. These latter actions had to be undertaken in their private capacities. Further, both the district and circuit courts noted that plaintiffs' private interests played a significant role. *National Helium Corp.* v. *Morton*, 361 F. Supp. 78, 90 (D. Kan.), *rev'd on other grounds*, 486 F. 2d 995 (10th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974); *National Helium Corp.* v. *Morton*, 455 F. 2d 650, 654. 655 (10th Cir.), *aff'g* 326 F. Supp. 151, 157 (D. Kan. 1971).

ately sought and enjoyed the advantages of a legally-enforced continuation of the contracts for over a year. If we allowed them now to rely, in spite of their long delay and acceptance of benefits under the continued contracts, on material breaches alleged to have occurred before the Morton termination, we would be authorizing them to enlarge their rights for material breaches, not merely preserving the rights they would have if they had not brought the injunction suit.

E.

The companies also urge, in excuse, that their continued performance was compelled by the injunction and by a provision in each contract requiring performance during the pendency of a dispute under the contract.[32] These arguments are not acceptable [33] but even if they were they would not be helpful. It would still be plaintiffs who forced the Government to continue performance against its will, and who received the advantages of that compulsion. In that situation they had, at the least, the duty to take appropriate action to claim material breach, and keep alive that claim, regardless of any requirement that they themselves continue performance while the claim awaited resolution. An explicit reservation could and should have been made of the right to consider the contract at an end. Better still, if the plaintiffs thought that their continued performance was obligatory, they could have followed Northern Helex's example and filed suit here with the explicit notification that they would continue performance for specified reasons. No special factors justify the

[32] National Helium mentions one further contract term as an indication that the parties intended that continued performance be without prejudice to either party's rights; the clause provided that waiver of one default could not operate or be construed as waiver of a further default. This clause had no application to this case because we are not construing a waiver of one breach as a waiver of another, later breach.

[33] The injunction operated only against the Government and therefore required nothing of the plaintiffs. As for the contract provision requiring continued performance, it applied only during the pendency of a dispute *under* the contract and therefore did not cover a claim for a material breach of a kind which would empower the contractors to end the contracts entirely. *See United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394, 412 (1966); *Universal Ecsco Corp.* v. *United States*, 181 Ct. Cl. 10, 15, 385 F. 2d 421, 424 (1967).

delay of suit in this court until well after the conclusion of the District Court proceeding.[34]

We hold, therefore, that because plaintiffs failed to end the contracts before the Morton termination and instead continued their own performance, and also because they affirmatively sought and accepted the benefits of the Government's continued performance, the contracts were still in effect at the time of the Morton termination. On the return of the cases to the trial division, the trial judges will have to determine the validity and effectiveness of the Morton termination under the contract clauses delimiting the grounds for such action. No evaluation of whether any acts prior to that termination constituted independent material breaches need be made. In particular, there need be no determination of the

[34] Plaintiffs' failure to proceed promptly with both suits cannot be explained as the product of a dilemma as to which claims had to be submitted to each tribunal or of an assumption that all claims could eventually be joined in one proceeding. We have emphasized that their course of action, especially their complete reversals of position late in the game, prejudiced the Government and benefitted themselves. Only one principle might have excused part of their delay in filing suit here: As a general rule, a good faith attempt to obtain a remedy for breach of contract which is in fact unavailable to the plaintiff does not bar a suit for another remedy for breach. *E.g.*, RESTATEMENT OF CONTRACTS § 383 (1932). Therefore, to the extent that some portion of the District Court suit could have been considered a good faith attempt to obtain one of the remedies for breach of contract, plaintiffs might have been able to bring suit here after having been denied contract relief there. However, the Court of Appeals made clear in its first decision that the plaintiffs could not have their contract rights adjudicated in the injunction suit (*see* note 7 *supra*), and plaintiffs could have immediately filed suit here to preserve the material breach rights they now claim.

Cities Service attempts to legitimize the long delay in suit in this court on another ground; it contends that the Russell termination was a repudiation that the Government never withdrew and that suit for material breach is allowed at any time before a repudiating party withdraws its repudiation. *See* note 24, *supra*. There are several answers. First, we doubt that a good faith attempt to exercise a termination right under the contract should be labeled a repudiation of the contract. Second, even if such action could be considered repudiation or if the termination was in bad faith (and therefore a repudiation), defendant's continued performance should be deemed withdrawal of repudiation. *See* notes 24, 25 *supra*. The lenient rule allowing the aggrieved party to delay suit assumes that the repudiator has discontinued performance and incurs no further costs or detriment because of the other's inaction. Third, in the case of repudiation the Uniform Commercial Code limits the aggrieved party's right to wait to a commercially reasonable time. UNIFORM COMMERCIAL CODE § 2–610(a). Fourth, the right to act on the repudiation may be lost, just as the right to end a contract for other types of material breach may be lost, if as here both parties continue performance. Thus, the same circumstances that preclude plaintiffs from claiming material breach prior to the Morton termination also preclude them from arguing repudiation via the Russell termination.

validity of the Russell termination, separately from any connection it may have with the Morton termination. We note, however, that evidence pertaining to the Russell termination may possibly be relevant to the validity of the Morton termination; such relevance (and the consequent issues of admissibility) are initially for the trial judges to decide. We intimate no position whatever on the point.

II

Plaintiffs' Motions and the Government's Cross-Motions for Partial Summary Judgment

Both plaintiffs have moved for summary judgment on the Government's liability, at the full contract rate plus interest as provided by the contract, for the helium delivered and tendered July 1, 1972, through November 19, 1973. They contend that the Government's liability for payments under the contracts continued, because the contracts were continued by the injunction, until the injunction was dissolved on November 19, 1973. The Government admits liability to April 4, 1973, the date the Morton termination was to have become effective, but denies liability after that time. The denial is premised on the Tenth Circuit's final decision holding the Government's environmental impact statement adequate and requiring dissolution of the injunction. The Government argues that the effect of the Court of Appeals' reversal in 1973 of the District Court was to end the injunction, and the plaintiffs' right to payment under the injunction, as of April 4.[35] For the period after that date, the Government opposes plaintiffs' motions and cross-moves on this thesis.[36]

There is no bar to entry of judgment for plaintiffs on the Government's liability for the contract price to April 4, 1973.

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[35] As we understand it, the Government's reasoning is as follows: Under the Circuit Court's decision, the Government had brought itself into compliance with NEPA by April 4, 1973, so the continuation of the injunction after that date was improper. The plaintiffs' right to payment under the injunction falls with the injunction. Moreover, in the Government's view there was no contractual right to payment after April 4 because the Morton termination was valid and effective as of that date.

[36] The basis of the Government's cross-motions, to recover any amount that it is required to pay plaintiffs for helium delivered and tendered after April 4 because of the injunction, is that the plaintiffs should not be allowed to benefit from the erroneous continuation of the injunction after April 4.

Conclusion

Since the defendant concedes its responsibility, the parties and court need not invest time and money in further litigation on the issue. *Cf.* 6 J. MOORE, FEDERAL PRACTICE § 56.11 (2d ed. 1976); 4 J. WIGMORE, EVIDENCE § 1064 (J. Chadbourn rev. ed. 1972); 9 J. WIGMORE, EVIDENCE §§ 2588–90 (3d ed. 1940); 61 AM. JUR. 2d Pleading § 179 (1972); 29 AM. JUR. 2d EVIDENCE §§ 615, 687 (1967).

However, the Government's post-April 4 liability is not so easily disposed of. As is apparent from the brief summary of the parties' arguments, determination at this time of that liability could entail the interpretation of another court's injunction, and its reversal by the appellate court, and an evaluation of the effect of the injunction and its reversal—in a suit which did not determine contract rights—on those rights which are for this court's adjudication. We decline now to resolve these difficult and sensitive questions because they will be mooted if it is concluded that the Morton termination was invalid.[37] For that reason we cannot at this time determine the issues definitively, and we may never have to answer them at all.[38]

CONCLUSION

The Government's motions for partial summary judgment are granted. The plaintiffs' motions are also granted to the extent of the Government's liability, at the contract rate plus contract interest, for unpaid helium delivered to April 4, 1973, but the plaintiffs' motions and the Government's cross-motions are otherwise denied without prejudice. The amount of plaintiffs' recovery for helium delivered to April 4, 1973, the effective date of the Morton termination, will be determined under Rule 131(c). The cases are remanded to the Trial Division for further proceedings in accordance with this opinion.

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[37] If the Morton termination was invalid or ineffective, the contracts continued beyond April 4, regardless of the effect of the injunction and its reversal.

[38] This ruling implies, of course, no view of the validity or effectiveness of the Morton termination.

Syllabus

543 F.2d 1321

MARCELLA BUSSE v. THE UNITED STATES

[No. 224–73. Decided October 20, 1976]

OPINION

Taxes; income tax; interest on deferred payments re sale of patent rights.—This tax refund action is before the court on a stipulation of facts. On March 20, 1958 Curtis Busse assigned to his brother, Gilbert, an undivided 50% interest in an invention made by Curtis. Curtis filed a patent application on March 21, 1958 and was granted a patent on August 16, 1960. Following Gilbert's death in July 1962, his widow, the present plaintiff, inherited Gilbert's one-half interest in a manufacturing partnership with Curtis, and Gilbert's patent interests. In 1966 plaintiff and Curtis formed a corporation to which they transferred their respective partnership and patent interests, each receiving 50% of the stock. Pursuant to agreement, plaintiff and Curtis were to receive 5% of the corporation's net sales of the patented invention for the life of the patent, and in 1966 and 1967 the corporation paid plaintiff certain sums which she reported as long-term capital gains. The Internal Revenue Service determined that as to the 1967 payment, a portion thereof should be treated as unstated interest pursuant to Sec. 483 of the Internal Revenue Code of 1954, and taxable as ordinary income. After certain adjustments and refunds, the IRS denied plaintiff's refund claim which is the subject of this action. It is *held* that plaintiff does not qualify as a "holder" of patent rights under Sec. 1235(a), that she cannot escape Sec. 483 imputed interest on the payments she received for her transfer of the patent to the corporation, and that the imputed interest was taxable as ordinary income. Plaintiff is not entitled to recover and her petition is dismissed.

Taxes; income tax; capital gains and losses; sale or exchange of patents.

[1] To come within a Sec. 1235(a) transaction and consequently the exemption of Sec. 483(f)(4), the taxpayer must meet the requirements of the term "holder" of patent rights as that term is used in Sec. 1235(a) and defined in Sec. 1235(b).

Internal Revenue ⇐ 321, 409.6

Taxes; income tax; capital gains and losses; sale or exchange of patents; "holder" of patent rights.

[2] The literal wording and structure of Secs. 1235(a) and (b) impose upon taxpayers (individual, not corporate) seeking the tax benefit of Sec. 1235(a), the threshold requirement that they meet the qualifications of a Sec. 1235(b), holder of patent rights. An heir to an investor's interests in a patent does not meet Sec.

Syllabus

1235's definition of a "holder" and accordingly he does not qualify for the tax benefits of the section.

Internal Revenue ⟸ 409.6

Taxes; revenue laws; construction and operation; generally.

[3] Sections of the Internal Revenue Code cannot be examined *in vacuo*.

Internal Revenue ⟸ 128

Taxes; income tax; capital gains and losses; sale or exchange of patents; "holder" of patent rights.

[4] Disregard for the definitional character of a Sec. 1235(b) "holder" of patent rights as that term is used in Sec. 1235(a) not only does violence to the very specific congressional design that the section apply only to a limited group of taxpayers defined as "holders" but also renders Sec. 1235(b) meaningless.

Internal Revenue ⟸ 409.6

Taxes; income tax; accounting method; adjustments; interest on certain deferred payments; sale or exchange of patents.

[5] For purposes of Sec. 483(f)(4), exceptions to Sec. 1235(a) can rightfully be ignored but not requirements to that section. Sec. 1235-type transactions disqualified because of an unauthorized "transfer" are not subject to imputed interest, but Sec. 1235-type transactions disqualified because of failure to meet the definition of "holder" are subject thereto.

Internal Revenue ⟸ 321

Taxes; revenue laws; construction and operation; legislative intent; sale or exchange of patents; "holders".

[6] The congressional intent in enacting Sec. 1235(a) was to limit patent transfers by a specific class of transferors defined as "holders" to the exclusion of all other taxpayers.

Internal Revenue ⟸ 409.6

Courts; judicial powers and functions; encroachment on legislature.

[7] Courts have no power to rewrite legislative enactments to give effect to their ideas of policy and fitness or the desirability of symmetry in statutes. The powers of repeal and amendment are uniquely legislative in their nature.

Constitutional Law ⟸ 70.1(2)

Robert A. Schnur, attorney of record, for plaintiff. *Michael, Best & Friedrich*, of counsel.

Kenneth R. Pike, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. *Theodore D. Peyser* and *Robert S. Watkins*, of counsel.

Before COWEN, *Chief Judge*, DURFEE, *Senior Judge*, and SKELTON, *Judge*.

Opinion of the Court

DURFEE, *Senior Judge*, delivered the opinion of the court:

In this tax refund action, plaintiff, an individual taxpayer, challenges the Internal Revenue Service's [IRS or Service] determination that the imputed interest provisions of the Internal Revenue Code (26 U.S.C. § 483) apply to the payments plaintiff received from the sale of her interest in a patent. Because of the specificity with which the Code section applies to the taxpayer, the Service must prevail on its determination.

The parties' stipulation provides the following factual backdrop to the instant controversy. In 1962, plaintiff, as widow of Gilbert Busse, inherited Gilbert's undivided one-half interest in a patent. Gilbert acquired his interest in the patent by a March 20, 1958 assignment of an undivided half-interest in an invention developed by his brother, Curtis Busse, sometime prior to that date. With the issuance in August 1960 of a patent on the invention, a method and machine for stacking cans on pallets, Gilbert and Curtis Busse became equal co-owners of the patent. At the time of the patent issuance Gilbert and Curtis were engaged in the partnership business of manufacturing equipment for the can making and canning industries under the name of Busse Brothers Company.

In 1966, following Gilbert's death and plaintiff's inheritance of both Gilbert's partnership and patent interests, plaintiff and Curtis agreed to form a Wisconsin corporation, Busse Bros. Inc., and transfer their respective partnership interests together with the operating assets of the partnership to the corporation, with plaintiff and Curtis each receiving 50 percent of the new corporation's stock. Incident to this agreement plaintiff and Curtis agreed to transfer their respective interests in the can stacking patent to the corporation. In return, each were to receive five percent of the corporation's net sales (as defined by the parties' agreement) of the patented invention for the life of the patent.[1]

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[1] The parties' agreement provided that in consideration for plaintiff's patent interest the corporation agreed to pay plaintiff:

"* * * periodic installments in the amount of 5% of Assignee's net selling price (as hereinafter defined) of palletizers and depalletizers (including parts and kits therefor) sold by assignee which are covered by any claim of said Patent * * *."

Under this agreement the corporation paid plaintiff $31,433.40 and $36,029.01 in 1966 and 1967 respectively. Plaintiff reported these amounts on her income tax returns for those years as long term capital gains. Upon subsequent audit the IRS, after various returns of capital adjustments, determined that of the $36,029.01 plaintiff received in 1967, $3,017.20 of that amount was unstated interest on the payment pursuant to section 483 and properly taxable as ordinary income.

In August 1970 plaintiff and the IRS entered into an Acceptance of Overassessment for tax years 1966 and 1967 with plaintiff reserving her right to pursue claims for additional refunds. In August 1971 the IRS denied plaintiff's March 1971 refund claim in the amount of $1,822.08. This action timely followed the IRS's denial of plaintiff's refund claim.

Section 483 [2] of the Internal Revenue Code provides that in sales or exchanges of property where the payments are

[2] 26 U.S.C. § 483. Interest on Certain Deferred Payments.

(a) *Amount Constituting Interest.*—For purposes of this title, in the case of any contract for the sale or exchange of property there shall be treated as interest that part of a payment to which this section applies which bears the same ratio to the amount of such payment as the total unstated interest under such contract bears to the total of the payments to which this section applies which are due under such contract.

(b) *Total Unstated Interest.*—For purposes of this section, the term "total unstated interest" means, with respect to a contract for the sale or exchange of property, an amount equal to the excess of—

"(1) the sum of the payments to which this section applies which are due under the contract, over

"(2) the sum of the present values of such payments and the present values of any interest payments due under the contract."

For purposes of paragraph (2), the present value of a payment shall be determined, as of the date of the sale or exchange, by discounting such payment at the rate, and in the manner, provided in regulations prescribed by the Secretary or his delegate. Such regulations shall provide for discounting on the basis of 6-month brackets and shall provide that the present value of any interest payment due not more than 6 months after the date of the sale or exchange is an amount equal to 100 percent of such payment.

(c) *Payments to Which Section Applies.*—

"(1) *In general.*—Except as provided in subsection (f), this section shall apply to any payment on account of the sale or exchange of property which constitutes part or all of the sales price and which is due more than 6 months after the date of such sale or exchange under a contract—

"(A) under which some or all of the payments are due more than one year after the date of such sale or exchange, and

"(B) under which, using a rate provided by regulations prescribed by the Secretary or his delegate for purposes of this subparagraph, there is total unstated interest."

Any rate prescribed for determining whether there is total unstated interest for purposes of subparagraph (B) shall be at least one percentage point lower than the rate prescribed for purposes of subsection (b)(2).

deferred for more than one year from the date of sale, an interest element, taxable at ordinary income rates, will be imputed as part of the payment(s) if no interest is specified in the sale/exchange agreement or the stated interest is unreasonably low. 3B Mertens, Law of Federal Income Taxation §§ 22.46a, 22.46b. This general rule applies both to fixed periodic deferred payments and indefinite deferred payments made more than one year after the sale date. *C.I.R.* v. *Brown*, 380 U.S. 563, 578 (1965). Plaintiff does not dispute that the payments she received fall within the general rule of section 483, *i.e.*, payments due more than one year after the sale of property under a contract providing for no stated interest on the deferred payments.[3] Rather, plaintiff seeks to avoid the application of section 483's imputed interest provisions to the payments she received by contending that § 483(f)(4) exempts the payments from the general rule of the section. Subsection (f)(4) insulates transactions described in section 1235(a) of the Code from the imputed interest provisions of section 483 by providing that section 483 "shall not apply to any payment made pursuant to a transfer described in section 1235(a) (relating to sale or exchange of patents)."[4]

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(2) *Treatment of Evidence of Indebtedness.*—For purposes of this section, an evidence of indebtedness of the purchaser given in consideration for the sale or exchange of property shall not be considered a payment, and any payment due under such evidence of indebtedness shall be treated as due under the contract for the sale or exchange.

(d) *Payments That Are Indefinite as to Time, Liability, or Amount.*—In the case of a contract for the sale or exchange of property under which the liability for, or the amount or due date of, any portion of a payment cannot be determined at the time of the sale or exchange, this section shall be separately applied to such portion as if it (and any amount of interest attributable to such portion) were the only payments due under the contract; and such determinations of liability, amount, and due date shall be made at the time payment of such portion is made.

* * * * *

(f) *Exceptions and Limitations.*—

* * * * *

"(4) *Sales or Exchanges of Patents.*—This section shall not apply to any payments made pursuant to a transfer described in section 1235(a) (relating to sale or exchange of patents)."

* * * * *

[3] *See* Thorington and Hardegree, *Imputed Interest—A Potential Tax Trap*, 54 A.B.A.J. 808 (1968).

[4] See note 2, *supra*.

A section 1235(a)[5] transaction is one in which a patent holder transfers all substantial rights to a patent, or an undivided interest therein. The parties differ on whether plaintiff's sale of her patent interest was such a transaction. The parties agree that the answer to whether section 483 applies to plaintiff comes from a determination of whether section 1235(a) describes plaintiff's sale of her patent interest. We find it does not.

Section 1235(a) specifies the rule that certain transfers of patents made not by any taxpayer or patent transferor but "by any holder" shall be considered the sale or exchange of a capital asset held for more than six months. Thus the initial requirement to come within the transaction described in section 1235(a) is that the patent transferor must be a "holder." While any taxpayer can transfer a patent and be accorded the tax treatment provided under other sections of the Code, only a holder can participate in the transaction described by § 1235(a) and qualify for the section's tax treatment. All

[5] 26 U.S.C. § 1235. Sale or Exchange of Patents.

(a) *General.*—A transfer (other than by gift, inheritance, or devise) of property consisting of all substantial rights to a patent, or an undivided interest therein which includes a part of all such rights, by any holder shall be considered the sale or exchange of a capital asset held for more than 6 months, regardless of whether or not payments in consideration of such transfer are—

"(1) payable periodically over a period generally coterminous with the transferee's use of the patent, or

"(2) contingent on the productivity, use, or disposition of the property transferred."

(b) *"Holder" Defined.*—For purposes of this section, the term "holder" means—

"(1) any individual whose efforts created such property, or

"(2) any other individual who has acquired his interest in such property in exchange for consideration in money or money's worth paid to such creator prior to actual reduction to practice of the invention covered by the patent, if such individual is neither—

"(A) the employer of such creator, nor

"(B) related to such creator (within the meaning of subsection (d))."

(c) *Effective Date.*—This section shall be applicable with regard to any amounts received, or payments made, pursuant to a transfer described in subsection (a) in any taxable year to which this subtitle applies, regardless of the taxable year in which such transfer occurred.

(d) [as amended by Sec. 54(a), Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606] *Related Persons.*—Subsection (a) shall not apply to any transfer, directly or indirectly, between persons specified within any one of the paragraphs of section 267(b); except that, in applying section 267(b) and (c) for purposes of this section—

"(1) the phrase "25 percent or more" shall be substituted for the phrase "more than 50 percent" each place it appears in section 267(b), and

"(2) paragraph (4) of section 267(c) shall be treated as providing that the family of an individual shall include only his spouse, ancestors, and lineal descendents."

other taxpayers must look to and be aware of other Code sections for the tax treatment of their patent transfers. Treas. Reg. § 1.1235–1(b).[6]

Section 1235(b) defines a "holder" as an individual (1) who either created the invention covered by the patent or (2) who purchased an interest in the invention prior to its actual reduction to practice. Plaintiff admits that she does not fall within either of these definitions of holder. This admission of itself defeats plaintiff's claim as it has previously been observed by at least two courts that patent transferors other than holders as defined in section 1235(b) cannot participate in a transfer described in section 1235(a). *Burde* v. *C.I.R.*, 352 F. 2d 995 (2d Cir. 1965), *cert. denied*, 383 U.S. 966 (1966); *Busse* v. *C.I.R.*, 479 F. 2d 1147 (7th Cir. 1973). In *Busse* the Seventh Circuit affirmed a Tax Court decision [7] that plaintiff's brother-in-law, Curtis, was entitled under sections 483 and 1235 to treat the payments he received from the corporation for the simultaneous sale with plaintiff of his interest in the can stacking patent solely as capital gain. In that decision the court noted that the corporation, which like plaintiff received its patent rights from a holder after the invention's actual reduction to practice, could not claim the benefit of the § 483(f)(4) exemption should it subsequently transfer the patent. *Busse* v. *C.I.R.*, *supra*, 479 F. 2d at 1152. This view of the applicability of the (f)(4) exemption to only "holders" as defined in section 1235(b) affirms the Tax Court's position that section 483(f)(4) "exempts from the operation of the imputed-interest provisions all capital-gain-producing transfers of patents by the favored group of individuals (holders)." *Busse* v. *C.I.R.*, 58 T.C. 389, 396–97 (1972).

In *Burde* the Second Circuit observed that the transferee of an invention which has been reduced to actual practice cannot claim the tax benefits provided to transfers described

[6] Treas. Reg. § 1.1235–1(b) (1966) provides:

(b) *Scope of section 1235.*

If a transfer is not one described in paragraph (a) of this section, section 1235 shall be disregarded in determining whether or not such transfer is the sale or exchange of a capital asset. For example, a transfer by a person other than a holder or a transfer by a holder to a related person is not governed by section 1235. The tax consequences of such transfers shall be determined under other provisions of the internal revenue laws.

[7] *Busse* v. *C.I.R.*, 58 T.C. 389 (1972).

in section 1235(a) because such transferees can never be section 1235(b) holders. Plaintiff is, by her own admission, such a transferee.

In spite of plaintiff's acknowledged inability to meet the section 1235(b) definition of "holder" and court decisions holding such as a requirement to qualify a patent transferor for participation in a transaction described in section 1235(a), plaintiff urges that because the (f)(4) exemption to section 483 applies by its terms to transfers described in section 1235(a), all other parts of section 1235, *i.e.*, § 1235(b), should be ignored in determining the applicability of section 483 to the payments she received for the sale of her patent interest. Alternatively, as the term "holder" is not defined in section 1235(a), plaintiff urges the court to adopt a more comprehensive definition of the term than that specified in section 1235(b). Both of these arguments must be rejected.

Contrary to the taxpayer's position our reading and analysis of section 1235(a) convinces us that to come within a § 1235(a) transaction and consequently the exemption of § 483(f)(4) the taxpayer must meet the requirements of the term "holder" as that term is used in § 1235(a) and defined in § 1235(b). The term "holder" appears textually only in § 1235(a), stating the general rule that certain transfers of patents made "by any holder" shall be considered the sale or exchange of a capital asset held for more than six months. Immediately following this general rule appears the § 1235(b) Congressional instruction that "for purposes of this section, the term 'holder' means" the creator of the device covered by the patent or certain unrelated financial backers. There can be no legitimate doubt that the literal wording and structure of sections 1235 (a) and (b) impose upon those taxpayers seeking the tax benefit of § 1235(a) the threshold requirement that they meet the qualifications of a § 1235(b) holder. Legitimate and knowledgeable conviction that § 1235(b) holder status stands as an indispensable part of a § 1235(a) patent transfer has long existed at both the bench and bar. *Burde* v. *C.I.R.*, *supra; Busse* v. *C.I.R.*, *supra; Dennis* v. *C.I.R.*, 473 F. 2d 274 (5th Cir. 1973); *Fawick* v. *C.I.R.*, 436 F. 2d 655 (6th Cir. 1971); *Charlson* v. *United States*, 208 Ct. Cl. 296, 525 F. 2d 1046 (1975); 3B

Mertens, Law of Federal Income Taxation, § 22.137; Greenbaum, "Tax Problems of Authors and Inventors," *Proc. NYU 13th Ann. Inst. on Fed. Taxation* 87 (1955); Kurtz, "Distinctions between License and Capital Transaction on Transfer of Patent," *Proc. NYU 23d Ann. Inst. on Fed. Taxation* 135 (1965); Hoffman, " 'Interest' in Deferred Payments Under the Revenue Act of 1964," *Proc. NYU 23d Ann. Inst. on Fed. Taxation* 921 (1965). The preceding authorities which contain additional references supportive of the view that a taxpayer must meet the section 1235(b) definitional requirements of a "holder" in order to qualify for participation in a patent transfer described in section 1235(a) uniformly agree that:

> The provisions of Section 1235 do not apply to all taxpayers. They apply only to individuals (and not corporations) qualifying as "holders," as that term is defined in Section 1235(b).[8]

Two decades ago one knowledgeable tax commentator, anticipating this case, forecast that as heirs to investor's interests in a patent could not meet section 1235's definition of a holder they could not qualify for the tax benefits of the section. Bailey, "The Inventor," *Proc. NYU 15th Ann. Inst. on Fed. Taxation* 285, 291–92 (1957). The instant decision validates that forecast.

Plaintiff's contention that section 1235(b) must be ignored in determining whether section 1235(a) describes her transfer of the patent eschews the fundamental principle that Code sections cannot be examined *in vacuo*. *Hellmich* v. *Hellman*, 276 U.S. 233 (1928). An interpretive principle already applied to analyses of sections 1235 and 483. *Burde* v. *C.I.R.*, *supra*; *Fox* v. *United States*, 510 F. 2d 1330 (3d Cir. 1975).

Disregard for the definitional character of a § 1235(b) "holder" as that term is used in § 1235(a) would not only do violence to the very specific Congressional design that the section apply only to a limited group of taxpayers defined as "holders" but also render § 1235(b) meaningless. Section 1235(b) states no rule but only provides the definition of the

[8] Greenbaum, "Tax Problems of Authors and Inventors," *Proc. NYU 13th Ann. Inst. on Fed. Taxation* 87, 91 (1955).

term "holder," a term used only in the preceding section to describe the transfers to which the section applies. Were we to say, as plaintiff urges, that in deciding whether a patent transfer was described by § 1235(a) that § 1235(b) must be ignored, the latter section would have no purpose. Such an argument, being obnoxious to our duty to interpret the Code as to give effect to all sections,[9] raises automatic suspicions as to the validity of plaintiff's argument. Suspicions which plaintiff has failed to quiet or explain.

Plaintiff's reliance on *Busse* v. *C.I.R.*, *supra; Paxton* v. *C.I.R.*, 53 T.C. 202 (1969); *Goldman* v. *United States*, 34 AFTR 2d ¶ 74-5301 (1974), which plaintiff recognizes as readily distinguishable from the instant case, provide no support for plaintiff's proposition that in determining whether section 1235(a) describes her patent transfer for purposes of deciding if the (f)(4) exemption of section 483 applies, all other parts of section 1235 must be ignored. In those cases the courts ruled not that § 1235(b) must be disregarded in determining whether a transfer meets the conditions of § 1235(a) as to come within the § 483(f)(4) exemption but that § 1235(d) can be disregarded for that purpose. Section 1235(d) states an exception to the general rule of the section by providing that transfers otherwise qualifying for tax treatment under section 1235(a) shall not be accorded that treatment if made to certain related persons. Section 1235(d) states an exception to the rule of section 1235(a) whereas section 1235(b) states a requirement to that rule. For purposes of section 483(f)(4), exceptions to section 1235(a) can rightfully be ignored, but not requirements to that section. The Seventh Circuit's acceptance of the Commissioner's view on this point disposes of plaintiff's *Busse/Paxton/Goldman* argument and renders unnecessary further elaboration. We agree with the Seventh Circuit's acceptance of the Service's position that:

> "* * * Section 1235-type transactions disqualified because of an unauthorized 'transfer' would not be subject to imputed interest, but Section 1235-type transactions

[9] *Montclair Twp.* v. *Ramsdell*, 107 U.S. 147 (1882); *American Bosch Magneto Corp.* v. *United States*, 79 Ct. Cl. 195, 6 F. Supp. 455 (1934).

> disqualified because of failure to meet the definition of 'holder' would be so subject. * * *." [10]

Review of the Congressional purpose behind section 1235 only serves to cement the view that unless a taxpayer initially qualifies as a "holder" as that term is defined in the section, his transfer of a patent cannot be described by the section. The legislative history of the section unequivocally evidences the intent of Congress that the section's general rule (§ 1235 (a)) describe only patent transfers by a specific and limited class of transferors defined as "holders" to the exclusion of all other taxpayers. Section 1235 first entered the Code in the Revenue Act of 1954, Pub. L. 85–866, 72 Stat. 1644 in Subchapter P. Part IV, "SPECIAL RULES FOR DETERMINING CAPITAL GAINS AND LOSSES." The Senate Report [11] on the section explained that § 1235(a) provided special tax treament to:

> * * * a transfer (other than by gift, inheritance or devise) of property consisting of all substantial rights evidenced by a patent, or consisting of an undivided interest therein, *by certain holders* * * *. [Emphasis added] [12]

The Senate Report noted the advent of § 1235 into the Code for the purpose of alleviating uncertainty over the tax treatment of patent transfers, thus providing "incentive to inventors to contribute to the welfare of the Nation * * * [and] statutory assurance to *certain patent holders*" that their sales of patents would be accorded favorable tax treatment.[13] The same report, while admitting that the section did not define the parameters of the sale or exchange of a patent beyond requiring that all substantial rights in the patent be transferred, noted that:

> * * * This requirement recognizes the basic criteria of a "sale or exchange" under existing law, with the exception noted relating to contingent payments, which exception

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[10] *Busse* v. *C.I.R.*, 479 F. 2d 1147, 1152 (7th Cir. 1973).

[11] S. Rep. No. 1622, 83d Cong., 2d Sess. 438, 3 U.S. Code Cong. & Admin. News (1954) 4621.

[12] *Id.* at 438, 3 U.S. Code Cong. & Adm. News at 5082.

[13] *Id.* at 439, 3 U.S. Code Cong. & Admin. News at 5082. [Emphasis added].

is justified in the patent area for "holders" as herein defined.

* * * * *

Subsection (b) specifies the categories of taxpayers who are entitled to the benefits of this section. It is limited to individuals. A "holder" is defined as any individual whose efforts created the patent property transferred, by which is meant the "first and original" inventor (or joint inventor) within the meaning of section 31 of title 35 of the United States Code. Individuals not eligible to qualify as such "first and original" inventor will not qualify under this definition: for example, the inventor's employer may not here qualify, even though he may be the equitable owner of the patent by virtue of an employment relationship with the inventor. However, your committee is desirous of extending the scope of this section to cover (in addition to inventors) those individuals who contribute financially toward the development of the invention. Accordingly, paragraph (2) of subsection (b) also includes within the definition of "holder" any other individual who acquired his interest in such property in exchange for consideration in money or money's worth (i.e., consideration capable of present valuation in monetary terms) actually paid to the creator prior to the time when the invention (to which the patent rights relate) is actually reduced to practice (as compared to "constructive" reduction to practice). This paragraph does not include any individual who is either an employer of any creator or related to any such creator within the meaning of subsection (d); however, the section does apply to all qualifying individuals, whether amateur or professional, regardless of how often they may have sold their patents. *The section is not applicable to any other purchasers or assignees.* [Emphasis added].[14]

The concluding paragraph of the Senate Report on section 1235 sounded the death knell for plaintiff's argument that section 1235(a) described her patent transfer:

It is the intention of your committee that, if the mode of payment is as described in subsection (a), the sale of a patent by any "holder" must qualify under the section in order for such "holder" to obtain capital gain treatment. However, the benefits of this section are to be limited to those individuals and transfers qualifying under its terms. In enacting this section, for the specific

[14] *Id.* at 439–40, 3 U.S. Code Cong. & Admin. News 5083–084.

> purposes set forth in this report, your committee has no intention of affecting the operation of existing law in those areas without its scope. For example, the tax consequences of the sale of patents in years to which this section is inapplicable, or by individuals who fail to qualify as "holders", or by corporations, is to be governed by the provisions of existing law as if this section had not been enacted. * * *.[15]

At the heart of plaintiff's claim lies her enmity at having to treat the payments she received for the sale of her patent interest partially as imputed interest taxable as ordinary income and partially as capital gain while her brother-in-law may treat all of the payments for his half interest in the same patent, sold at the same time to the same buyer for the same price solely as capital gain. *Busse* v. *C.I.R.*, *supra*. While plaintiff characterizes this result as unjustified and irrational, we cannot say after a review of the section's language, legislative history and reputable tax treatises that Congress with good reason did not intend the instant result of treating transferors of patents differently depending on their "holder" status.

Judge Hastings in the Seventh Circuit's *Busse* decision provided the succinct answer to attacks on the equity of applying Code provisions as written and intended by Congress even though they may result in dissimilar treatment of taxpayers:

> However much the statute, in operation, may offend the [taxpayer's] sense of symmetry and propriety, we cannot say that the results it causes are either absurd or unintended by Congress. Courts have no power * * * "to rewrite legislative enactments to give effect to" their "ideas of policy and fitness or the desirability of symmetry in statutes." *United States* v. *Shirah*, 4 Cir., 253 F. 2d 798, 800 (1958). The powers of repeal and amendment are uniquely legislative in their nature. * * *.[16]

To escape the imputed interest provisions of section 483 on payments subject to that section resulting from a taxpayer's transfer of a patent, the Code specifically dictates that the transfer must be one described in section 1235(a). With equal specificity section 1235(a) requires that the patent transferor must be a "holder" which, for purposes of that

[15] *Id.* at 439–40, 3 U.S. Code Cong. & Admin. News 5083–84.
[16] *Busse* v. *C.I.R.*, 479 F. 2d 1147, 1152 (7th Cir. 1973).

section, is defined by section 1235(b). Since plaintiff cannot qualify as a holder under section 1235(b) her patent transfer cannot be deemed one described in section 1235(a) and accordingly, plaintiff cannot escape section 483 imputed interest on the payments received for her transfer of the patent. Judicial decisions, the legislative history, and several comprehensive analyses of section 1235(a) unanimously support this view, and plaintiff's briefs and our own research have uncovered nothing to the contrary.

Accordingly, plaintiff is not entitled to recover and her petition is dismissed.

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543 F.2d 134

ALVIN L. RASMUSSEN v. THE UNITED STATES

[No. 121–75. Decided October 20, 1976]

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Civilian pay; reduction-in-force; procedural violation; measure of recovery.—This case involves a former GS–13 physicist of the National Bureau of Standards who received a notice of reduction-in-force, that his position was to be abolished, and an offer of a GS–7 job. Although plaintiff accepted the GS–7 position as an alternative to separation, he later appealed the reduction-in-force to the Regional Office of the Civil Service Commission which denied his appeal; the Board of Appeals and Review rescinded the decision and remanded for more detailed review of plaintiff's qualifications for one of two GS–12 electronic engineer positions; the Regional Office then decided favorably to plaintiff and found that he could perform the duties of the positions within 90 days (as provided by the Federal Personnel Manual Letter 351–7) and without undue interruption of the agency activity; the agency appealed and the Board reversed after receiving and considering the agency's newly presented additional evidence and an advisory opinion based thereon, and sustained the agency's actions. Plaintiff filed the present action seeking back pay and reinstatment to one of the GS–12 positions. It is *held* that the Board violated procedural regulations to the plaintiff's detriment in not excluding the additional evidence or remanding it for full consideration at the Regional level, that plaintiff should have had the opportunity to deal with the added material at a personal appearance or to produce other evidence to the contrary, and that it was this evidence which caused the Board to overturn the Region's favorable determination. It is also *held* that the procedural lapse vitiated the Board's decision and in turn invalidated the reduction-in-force

Syllabus

since plaintiff's reassignment rights were an integral part of the reduction-in-force and were governed by regulations and the Federal Personnel Manual imposing on the agency specified assignment and "bumping" steps. Plaintiff is entitled to recover the pay of the GS–12 position running from the time he began to be paid as a GS–7. He is also entitled, pursuant to Pub. L. 92–415, to be reinstated in one of the GS–12 engineer positions or in another GS–12 position for which he is qualified. He is not entitled to interest, attorney's fees or costs. The amount of recovery will be determined in further proceedings.

Civilian pay; adverse personnel action; applicability; reduction-in-force.

[1] A reduction-in-force is not an adverse action to which cross-examination rights attach.

Officers ⇐ 69.11

Civilian pay; hearing; agency level hearing; right to hearing.

[2] In administrative proceedings contesting assignment rights after reduction-in-force, the employee does not have a right to nor does he receive a trial-type hearing; at the regional level he is accorded only a personal appearance which differs markedly from a full hearing and does not carry cross-examination with it.

Officers ⇐ 69.11

Civilian pay; appeals to Civil Service Commission; evidence before Board of Appeals and Review; scope of review.

[3] 5 C.F.R. § 772.307(b) (1974) provides that the Board of Appeals and Review shall review the record of proceedings and all relevant written representations. Where the Board in reviewing plaintiff's assignment rights in a reduction-in-force did not restrict itself to a review of the record developed and relied upon by the regional office but considered the agency's newly presented additional evidence and an advisory opinion based thereon, the Board exceeded its scope of review. The plain and ordinary meaning of "review" is "to examine again," and the reference to "record of proceedings" assumes a preexisting record.

Officers ⇐ 69.11

Civilian pay; regulations of Executive Department; appeals to Civil Service Commission; Appeals Review Board scope of review.

[4] The amendments embodied in 5 C.F.R. § 772.310 (1975), respecting reconsideration of previous decisions of appeals officers, show that the Commission deemed preclusion of a party's submission of additional evidence to the appellate tribunal as harmonious with the basic requirement that the Board "review the record of the proceedings and all written representations." The court regards the new regulations as spelling out what was implicit in the former requirement.

Officers ⇐ 72(2)

Syllabus

Civilian pay; appeals to Civil Service Commission; evidence before Board of Appeals and Review; scope of review.

[5] Where the Board of Appeals and Review in reviewing plaintiff's assignment rights in a reduction-in-force considered not only the record below but also the agency's newly presented additional evidence and an advisory opinion based thereon, since plaintiff suffered substantial prejudice therefrom he should have been afforded the opportunity to deal with this added material at a personal appearance or to produce other evidence to the contrary. Representations that the Board may consider initially are legal arguments; representations it "shall review" (rather than consider initially) are representations of fact.

Officers ⟸ 72(2)

Civilian pay; reduction-in-force; assignment rights; assignments involving displacements.

[6] Relevant regulations and the Federal Personnel Manual put the employing agency on notice that it has to evaluate a RIF'd employee's assignment rights and of the potential undue interruption to the agency's program if he were given another position in the same grade before it notifies him that a lower grade position is the most reasonable offer it could make. Once an employee makes a strong showing that he falls within the 90-day provision of the Federal Personnel Manual Letter 351–7, the burden is on the agency to rebut the showing or to demonstrate the irrelevance of the ordinarily applicable 90-day guideline.

Officers ⟸ 69.13

Civilian pay; appeal to Civil Service Commission; evidence before Board of Appeals and Review; new evidence.

[7] The right of a RIF'd employee before the Board of Appeals and Review to comment in writing on the agency's newly presented additional evidence and an advisory opinion based thereon which the Board considered in connection with its review of the employee's assignment rights is not the equivalent of the opportunity at the regional level for a personal appearance and the right to introduce evidence at that point to the contrary.

Officers ⟸ 72(2)

Civilian pay; reduction-in-force; procedural violation, effect of.

[8] Where there has been a substantial departure from applicable procedures, a misconstruction of governing legislation, or like error going to the heart of the administrative determination, judicial review of a reduction-in-force is obtainable.

Officers ⟸ 72(2)

Civilian pay; reduction-in-force; Back Pay Act.

[9] The Back Pay Act, 5 U.S.C. § 5596(b) (1970) provides the vehicle for allowing back pay to an employee whom the court has

Opinion of the Court

determined has undergone an unjustified or unwarranted reduction-in-force.

United States ⟸ 39(7)

Civilian pay; reduction-in-force; recovery, measure of.

[10] Where the court has determined that the administrative board violated regulations to plaintiff's detriment in reviewing agency actions in connection with plaintiff's assignment rights after a reduction-in-force, plaintiff is entitled to the equivalent of the pay of the higher grade position from the time he began to be paid in the lower grade position. Interest prior to judgment and attorney's fees are not allowable under statute.

Officers ⟸ 76

James C. Bull, attorney of record, for plaintiff. *Quiat, Bucholtz & Bull*, of counsel.

Lawrence S. Smith, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before LARAMORE, *Senior Judge*, DAVIS, and SKELTON, *Judges*.

DAVIS, *Judge*, delivered the opinion of the court:

This civilian pay case originated in a National Bureau of Standards reduction-in-force which took Alvin Rasmussen, a long-standing employee of the Federal Government, from his GS–13 Physicist position in Colorado and left him in a GS–7 Physicist slot. The focus of the several administrative appeals was Rasmussen's assignment rights under 5 C.F.R. §§ 351.701, 351.703 (1974); the Civil Service Commission had to decide whether Rasmussen was entitled to bump one of two GS–12 Electronics Engineers or whether, instead, he was properly denied those jobs because his placement in either of them would unduly interrupt the work program.

Early in 1973, plaintiff received a specific notice of reduction-in-force, informing him that his GS–13 position was to be abolished and offering him a GS–7 job. Plaintiff at first accepted the GS–7 spot [1] but subsequently appealed the reduction-in-force to the regional office of the Civil Service Commission. Pursuant to Rasmussen's request, the appeals examiner scheduled a personal appearance which agency rep-

[1] His alternative was separation.

resentatives, plaintiff, and his representative attended. The appeals examiner's decision, against Rasmussen, followed the personal appearance and the parties' submission of further information and responses requested and authorized by the examiner. Rasmussen then appealed to the Civil Service Board of Appeals and Review (BAR), which rescinded the decision of the Region and remanded for more detailed review of plaintiff's qualifications for a GS–12 electronics engineer position. After obtaining a rating of those qualifications through its staffing division, the regional office issued its second decision, which was favorable to plaintiff; the Region found that he could perform the duties of the positions within 90 days and without undue interruption to the activity, and recommended that the agency offer him either of the positions or any other position with a rate of pay of GS–12 for which he was qualified. The agency appealed this decision and the BAR (which became the Appeals Review Board (ARB) during the pendency of this second appeal) reversed, withdrew the recommendation that plaintiff be offered a place at the GS–12 level, and sustained the agency's actions which it found error-free. Plaintiff asked the Commissioners to reopen and reconsider the ARB's decision, and initiated suit here after they denied his request.

It is important to set out in greater detail the administrative treatment of the overriding issue of whether plaintiff could appropriately replace one or the other of the two GS–12 employees whom he was trying to bump. After he accepted the GS–7 job but before he filed his initial application to the Civil Service Commission, his division chief, H. S. Boyne, prepared statements on the undue interruption he believed would result from the placement of Rasmussen in either GS–12 slot.[2] After plaintiff filed his Commission application, Boyne wrote memoranda amplifying his earlier statements. These comments were submitted to the Commission's regional

[2] Boyne also had certified new position descriptions for those slots. His certifying signature was undated, but the certification by the Personnel Management Specialist bore the same date as plaintiff's notice of reduction-in-force. That was the only date carried by the official position description forms, though the supplemental pages containing the actual descriptions antedated those forms by about one and one-half months.

appeals examiner, as were additional materials and responses to Rasmussen's written allegations and oral statements made at the personal appearance.

At the personal appearance and in plaintiff's appeal to the BAR after the Region's first, adverse decision, plaintiff's representative stressed a change made in the Federal Personnel Manual (FPM) provisions on reductions-in-force by FPM Letter 351–7:

> In no case, however, does undue interruption mean mere inconvenience. Serious inconvenience and even severe interruption of the work program are often the unavoidable results of reduction in force. Undue interruption, therefore, is a degree of interruption that would prevent the completion of required work within the allowable limits of time and quality. It naturally follows that any finding of undue interruption must be related directly to the nature of the particular work program to be affected. Depending upon the pressures of priorities, deadlines, and other demands, the ordinary work program probably would not be unduly interrupted if optimum quality and quantity of work were not regained within 90 days after a reduction in force. Lower priority programs might tolerate even longer interruption.

Before the BAR, on the first appeal, the employee's representative contended that the Region had ignored the intent of this provision and that the agency had failed to show either that plaintiff could not attain full performance within 90 days or that the program could not tolerate an even longer interruption. In response, the agency noted that Rasmussen and his representative had made the Region aware of FPM Letter 351–7 at the personal appearance, declared that the agency was "most familiar" with the letter and had tried to observe its requirements and intent, and submitted a further statement by Boyne (written after plaintiff had appealed to the BAR) emphasizing the non-ordinary nature of the GS–12 jobs. Boyne also pointed out that there was a difference between regaining optimum performance and achieving merely satisfactory performance, which his previous undue interruption statements had addressed. It was at this juncture that the BAR decided, on the first appeal, to remand for additional investigation.

The agency submitted no new evidence to the Region during the reconsideration of the case.[3] The Region turned to its Staffing Division for advice. That Division reported that an expert examiner in the field had assigned Rasmussen's qualifications for both GS–12 positions a rating of 89, only slightly less than outstanding, and believed Rasmussen could perform the duties at a satisfactory level within a month or two. Upon consideration of the FPM Letter emphasized by plaintiff, *supra*, the agency's representations to the BAR about the non-ordinary nature of the GS–12 work, and the expert examiner's rating, the Region ruled in favor of plaintiff's assignment to one of the GS–12 positions.

Only on the second appeal to the BAR/ARB (*i.e.*, the agency's appeal from the second regional decision) did the agency submit the evidence now challenged. The agency wrote a "brief" alleging several errors in the Region's decision and supplied the Board with two new memoranda, prepared by employees who had not previously made statements,[4] detailing the work in progress at the time of the reduction-in-force and their views on the undue interruption that would have resulted from Rasmussen's assignment to one of the positions. The Board accepted these memoranda, which the agency termed "additional representations," and included them with the record sent to the Civil Service Commission's Bureau of Recruiting and Examining, Career Service Division, when the Board asked that Division for its opinion on Rasmussen's qualifications for the GS–12 positions. This solicitation of an advisory opinion, which was unfavorable to plaintiff and which the Board quoted almost in its entirety in the final decision against plaintiff, is also challenged here.[5]

In appraising plaintiff's contentions, we put aside the claim that it was error for the BAR to receive the additional material from the agency because that material contained

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[3] On the Region's request, the agency resubmitted the position descriptions certified on the same date as plaintiff's reduction-in-force notice. *See* note 2 *supra*.

[4] One was written by the person who had been plaintiff's immediate supervisor at the time of the reduction-in-force.

[5] The Board provided plaintiff with copies of the agency's additional evidence and the Bureau's advisory opinion and gave him the opportunity to comment on them in writing.

evidence as to which plaintiff had the right of cross-examination. A reduction-in-force is not an adverse action to which cross-examination rights attach. *See* 5 C.F.R. §§ 752.103(b)(3), 771.202(b)(3), 772.301, 772.305(a) (1974); *Wilmot* v. *United States*, 205 Ct. Cl. 666, 679 (1974); *Fitzgerald* v. *Hampton*, 467 F. 2d 755, 758 (D.C. Cir.), *stayed pending filing of cert. petition*, 409 U.S. 1055 (1972), *stay dissolved*, 409 U.S. 1100 (1973).[6] Plaintiff neither had a right to nor received a trial-type hearing; at the regional level he was given only a personal appearance, which differs markedly from a full hearing and does not carry cross-examination with it. *See Grover* v. *United Statees*, 200 Ct. Cl. 337, 349–51 (1973).

We do, however, find merit in the allegation that the Board exceeded its scope of review when it considered the agency's newly presented additional evidence and the advisory opinion based thereon. The regulation governing the Board's proceedings required it to *review* the record and relevant written representations.[7] The plain and ordinary meaning of "review" is "to examine again," and the reference to the "record of the proceedings" assumes a preexisting record. The Board could not examine *again* evidence not previously examined by the Region, and not already in the record. *Cf. United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 714–15, 717 (1963); *Chandler* v. *Roudebush*, 425 U.S. 840, 856–63 (1976). Apparently, the Board agreed with this interpretation of the regulation, for it began its "Analysis and Findings" with this sentence: "The Board has fully reviewed the appellate record developed and relied upon by the Denver Regional Office to determine whether, in light of the representations to the Board, the Region was correct in concluding that appellee was not afforded a reasonable offer of assignment." The difficulty is that the Board did not restrict itself to review of the record "developed and relied upon by the Denver Regional Office" but had before it (and placed before the other

[6] Full hearing rights may attach if the reduction-in-force is but a disguised dismissal for reasons personal to the released employee. *See Fitzgerald* v. *Hampton*, *supra* at 758–60; *cf. Keener* v. *United States*, 165 Ct. Cl. 334, 338–39 (1964); *Ritter* v. *Strauss*, 261 F. 2d 767 (D.C. Cir. 1958).

[7] 5 C.F.R. § 772.307(b) (1974) states that "[t]he Board of Appeals and Review shall review the record of the proceedings and all relevant written representations."

Civil Service division to which it turned for advice) significant factual materials that were not part of the Region's record.

Amendments to the regulations—which became effective before the Board handed down its decision but after all other administrative action, including receipt of the advisory opinion, had occurred—strengthen our view of the proper interpretation of the Board's then authority. Those amendments retain the "shall review the record of the proceedings and all written representations" language (5 C.F.R. § 772.310(g) (1975)) and add several paragraphs requiring both parties to submit all their evidence at the regional level. 5 C.F.R. § 772.305(a) (1975) provides: "Statements of witnesses shall be by affidavit, when practicable, and relative to the adverse decision. It is the responsibility of both parties to the appeal to submit all evidence to the appropriate office of the Appeals Authority [the initial Civil Service Commission level, corresponding to the former regional office] having jurisdiction." [8] A new section 772.308, captioned "Closing the record," states: "The Appeals Authority shall close the record in any case after the parties to the appeal have had a full opportunity to present any and all relevant and material evidence. * * * When the record is closed there is no right to submit additional evidence into the record." The regulations authorize the Appeals Review Board to receive evidence not considered by the Appeals Authority only where the party proffering the evidence makes a showing that the evidence is "new," *i.e.*, that it was not readily available when the appeals officer's decision was rendered. 5 C.F.R. § 772.310 (1975). There is no assertion here that the agency's additional evidence, consisting of statements about the situation existing at the time of the RIF and written by employees who were employees at the time of the RIF, was new evidence not readily available at the time of the second regional decision.

Under the new regulations it is clear that the agency could not have submitted (and the Board could not have consid-

[8] The subsection which had limited the applicability of this section was removed, so the provision now governs reduction-in-force appeals.

ered) the additional evidence. These regulations do not directly govern the case because they became effective too late in the proceedings and were part of a reorganization that made the Appeals Authority's decisions final and converted the Appeals Review Board's function to a discretionary review from an "appeal as of right." However, they do show that the Civil Service Commission deemed preclusion of a party's submission of additional evidence to the appellate tribunal as harmonious with the basic requirement that the Board "review the record of the proceedings and all written representations." We regard the new regulations as spelling out what was implicit in the former requirement.

This reading of the limitations on the Board's power to receive new evidence—under the former as well as the current regulations—has a triple impact. First, it serves to assure that, if an appeal is taken and allowed, two levels of the Civil Service Commission dissect and evaluate all the evidence, and in that way furthers the objective of careful, thorough, and impartial fact-finding. Second, and perhaps more important, the restriction of the appellate Board to the record made at the first level impels the parties to present their materials at that stage rather than, as was true of the Government in this instance, trying to shore up the record by belated and piecemeal additions after suffering failure at the initial level. *Cf. Western Shoshone Legal Defense & Educ. Ass'n* v. *United States*, 209 Ct. Cl. 43, 52–53, 57–59, 521 F. 2d 495, 499–500, 502–03 (1976). Third, in forcing the parties to supply all factual information to the Region, so far as possible, the limitation on the Board gives substance to the practice of granting the employee a personal appearance at that time (if requested).[9] This personal appearance is the substitute for a full trial-type hearing and is the best opportunity the employee has to answer the case presented by his employing agency. A grave dilution of the employee's op-

[9] The regulations and the Federal Personnel Manual were silent on the matter of a personal appearance at the Commission's regional level for an employee contesting his reassignment after a reduction-in-force. However, plaintiff's simple request for such a hearing was granted without question, and it appears to have been the normal practice to accord such an appearance if sought.

portunity to discuss and comment on the evidence results if significant material is withheld until the Board level.[10]

For these reasons, we base our decision on this error of accepting and acting on new evidence at the Board level.[11] *Cf. Kozak* v. *United States*, 198 Ct. Cl. 31, 458 F. 2d 39 (1972) (plaintiff claimed that Librarian's reversal of board's recommendation was arbitrary and capricious because he relied on a memorandum based on unofficial records not in evidence before board; court found argument meritorious and reason to enter judgment for plaintiff, especially in light of fact that the key memorandum was written after plaintiff's separation).[12] The Board should have excluded the additional evidence or remanded it for full consideration by the Region.[13]

This holding does not preclude parties to Board proceedings from making arguments expressing their views of the applicable law or interpretations of the evidence. This they may do, just as they may before an appellate court. However, the agency submissions at issue here included factual evidence of the type that would cry out for cross-examination and counter-testimony in an administrative hearing or court trial—allegations of fact about the duties and projects of the

[10] The regulations provide (5 C.F.R. § 772.307(b) (1974); *id.* § 772.310(f) (1975)) that there is no right to a hearing before the Board and that the Board has discretion whether or not to allow a personal appearance and the presentation of oral arguments and representations. These provisions make it all the more important that the full factual record be made below, not at the appellate step.

[11] We think that plaintiff sufficiently raised this point at the Board level, considering that he was not there represented by a lawyer but by himself and by union officials. He expressly challenged the right of the Board to obtain its own advisory opinion (which was based on the new evidence) and, more obliquely, referred to "the fact that NBS [National Bureau of Standards] then proceeded to circumvent the examiner's opinion" after the second regional decision.

[12] We note that all of the undue interruption statements in Mr. Rasmussen's case were written after his notice of reduction-in-force and offer of the GS–7 assignment. The decisive memoranda were written over a year after that date.

[13] In two civilian pay cases, both involving dismissals and the procedures applicable to such personnel actions, the court has considered allegations that new evidence was improperly admitted at an appellate level. In *Shadrick* v. *United States*, 151 Ct. Cl. 408 (1960), the court did not decide the new evidence issue because the alleged evidence (given to the Commissioners) contained new charges against the plaintiff, and the court held that the addition of new charges violated plaintiff's rights. *Id.* at 430–33. In *Atkinson* v. *United States*, 144 Ct. Cl. 585 (1959), the court concluded that the Board's consideration of new evidence was in accord with the regulation's provision allowing such consideration under certain circumstances. *Id.* at 600. These cases therefore do not guide us; their different factual premises and governing regulations distinguish them.

employees plaintiff sought to displace and about his ability to perform their functions. Even though a trial-type hearing was not available in this instance, plaintiff should have had the chance to deal with this added material at a personal appearance or to produce other evidence to the contrary. Evidence of this type should be placed before the initial decider (unless, perhaps, it cannot be obtained or is undiscovered at that time), not produced after the record is made and then accepted by an appellate board as the basis for reversal on appeal. *Cf. Kozak* v. *United States*, *supra*. In *Vogt* v. *United States*, 150 Ct. Cl. 636 (1960), the court held that a regulation requiring the Commission appeals examiner to discuss with the parties and to make available for their consideration all relevant representations applied only to representations of fact, not to interpretations of law. *Id.* at 640. Similarly, here the "representations" that the Board may consider initially are legal arguments, while the "representations" it "shall review" (rather than consider initially) are representations of fact.

The determination that the agency could not give the Board and the Board could not accept and consider evidence that could and should have been produced before the regional appeals examiner places no unfair or unforeseeable burden on the employer. The regulations and the Federal Personnel Manual put the agency on notice that it had to evaluate plaintiff's assignment rights, and the potential undue interruption if he were given one of the GS–12 posts, before it gave plaintiff his notice stating that a GS–7 position was the most reasonable offer it could make. 5 C.F.R. §§ 351.603, 351.701, 351.703 (1974); FEDERAL PERSONNEL MANUAL ch. 351, §§ 7–3, 7–4, 7–6. And as the agency itself stressed in its letter responding to plaintiff's appeal of the first regional decision, Rasmussen and his representative had brought FPM Letter 351–7 to the appeals examiner's (and the agency's) attention during that first regional consideration, and the agency was "most familiar" with and had tried to implement that letter.[14] Thus,

[14] The relevant provision of FPM Letter 351–7 now appears in section 4–3.b. of chapter 351 in the Federal Personnel Manual. This provision is in the subchapter covering the agency's determination of competitive level and the scope of "first-round" competition (subchapter 4), not in the subchapter dealing with

(Continued)

the agency knew long before the Region issued its second decision, and even before it issued its first, that the agency needed to confront the issues raised by the letter.[15] Those questions had become paramount by the time the Board remanded for a second regional consideration, and once the plaintiff had made a strong showing that he fell within the 90 days specified in the letter, the burden fell on the agency to rebut the showing or to demonstrate the irrelevance of the ordinarily applicable 90-day guideline. Yet, the agency chose not to provide the Region with any further evidence during its consideration on remand. At that time the agency apparently thought, incorrectly, that "undue interruption" was a magic phrase it could invoke, conclusorily, to stave off an adverse ruling despite the strength of plaintiff's evidence, weakness in the agency's, and the spirit of FPM Letter 351–7.

We are mindful, of course, that a procedural error for improperly admitted evidence or for consideration of evidence outside the record will not normally be controlling if the plaintiff did not suffer substantial prejudice. *See Charley* v. *United States*, 208 Ct. Cl. 457, 472 (1975); *Haynes* v. *United States*, 190 Ct. Cl. 9, 14–15, 418 F. 2d 1380, 1383–84 (1969); *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 529–30 (1946). In this case the injury is apparent. The advisory opinion from the Career Service Division, which the Board quoted extensively, stated that the Division believed Rasmussen's experience "would ordinarily enable" him "to perform the full duties of position #3–9018 [one of the two GS–12 jobs] with minimal training." But the opinion continued with "However," a litany of

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assignment rights, or "second-round" competition, arising after the agency has reached an employee for release from his competitive level (subchapter 7). *See* FPM ch. 351, subchs. 4, 7; 5 C.F.R. §§ 351.401–.404, 351.601–.603, 351.701, 351.703 (1974). However, the parties have treated the provision as applicable throughout the administrative and court proceedings, and its amplification of "undue interruption" in one context certainly is pertinent in the other, which involves similar factors and requires consideration of undue interruption. *Compare* 5 C.F.R. § 351.403 (1974) *with id.* § 351.701.

[15] The letter contained these phrases which plaintiff has treated as pivotal: "In no case, however, does undue interruption mean mere inconvenience. • • • [T]he ordinary work program probably would not be unduly interrupted if optimum quality and quantity of work were not regained within 90 days after a reduction in force. Lower priority programs might tolerate even longer interruption."

facts that could only have been drawn from the agency's additional evidence, first presented at the appellate stage, and the conclusion that undue interruption would result from plaintiff's assignment to the position. In other words, the Career Service Division would have advised that plaintiff was qualified for and entitled to one of the two positions sought but for the additional evidence accepted by the Board and given the Division with the rest of the record compiled below. The Board gave great weight to this advisory opinion and did not disclaim reliance on the additional evidence. *Cf. Charley* v. *United States*, *supra* at 472–73. We can only conclude—from these factors and the Board's cryptic statements that it had considered all pertinent information and reviewed the appellate file and that it found plaintiff's experience and training insufficient for both positions (with no precise explanation of the respects in which his experience was insufficient) without undue interruption—that the Board, like the Career Service Division, relied squarely on the additional evidence when it decided to reverse the Region's decision.[16] It was, in a word, this late material which caused the Board to overturn the Region's determination in favor of Rasmussen.

Moreover, the evidence, including that considered improperly at the Board level, leaves the issue of undue interruption a very close one (even from the agency's point of view). This is not a situation in which the belatedly admitted material proves conclusively that the agency was right and that no other determination could have been made. If plaintiff had had an opportunity to discuss the additional material at his personal appearance before the Region, and perhaps to obtain at that time some further evidence in his own behalf, he might have been able to persuade the Region and the Board that he was correct. The right before the Board to comment on the

[16] That the Board relied heavily on the factual material first presented on the second appeal is also shown by its decision, on the first appeal, that the case required further ventilation by the Region. As we have pointed out, the agency presented no significant new material to the Region after the remand but rested on the record already made. The only addition to that record on remand was the advisory opinion favorable to Rasmussen which the Region obtained from its staffing division. Thus, in the absence of the new agency submissions during the second appeal, the Board would have had before it only the record which it believed necessitated remand on the first appeal and an advisory opinion favorable to plaintiff and contrary to the Board's final decision.

new information in writing was not the equivalent of the opportunity at the regional level for a personal appearance and the more expansive right, as a practical matter, to introduce evidence at that point in the proceedings. Since the evidence as a whole is so much in balance, violation of these procedural rights takes on a special importance.[17]

Because we have determined that the Board violated a procedural regulation to the plaintiff's detriment, we need not resolve the issue of whether on the merits there was substantial evidence to support the Board's ultimate result.[18] The major procedural lapse vitiated the Board's decision. This in turn invalidated the plaintiff's reduction-in-force since his reassignment rights were an integral part of that reduction. The same notice which told him that his position was to be abolished also informed him as to the post (*i.e.* the GS–7 slot) to which the agency believed him entitled under Civil Service regulations; and those regulations imposed on the agency specified assignment and "bumping" steps in connection with the reduction-in-force (5 C.F.R. §§ 351.603, 351.701, 351.703 (1974)), as well as the procedural steps the employee could take to vindicate his rights. These assignment rights were as important as, perhaps more important than, the validity of the abolishment of the GS–13 job itself. Thus, the failure to accord plaintiff a significant procedural right means that the reduction-in-force cannot be enforced. *Cf. Kozak* v. *United States*, *supra*, 198 Ct. Cl. 31, 458 F. 2d 39 (1972); *Newman* v. *United States*, 143 Ct. Cl. 784, 798–99 (1958); *Baxter* v. *United States*, 129 Ct. Cl. 254, 136 F. Supp. 748 (1954), *cert denied*, 350 U.S. 936 (1956); *Simon* v. *United States*, 113 Ct. Cl. 182 (1949). With respect to reduction-in-force, this court has said that "where there has been *a sub-*

[17] In *Rifkin* v. *United States*, 209 Ct. Cl. 566, 592–94 (1976), the court held it sufficient that the employee was given the opportunity to respond in writing, at the Secretarial level, to certain *ex parte* communications on behalf of the employer, but there the new factual material contained in the communications was collateral to the main issue in the case and primarily concerned the penalty rather than the dereliction charged. *Cf. Williams* v. *New York*, 337 U.S. 241 (1949). Here, the new facts went to the very heart of the substantive issue.

[18] Nor need we consider plaintiff's contention that his agency division had a program of "riffing" older employees and then hiring in their place new guest workers, post doctor and junior fellows, as well as term employees.

stantial departure from applicable procedures, a misconstruction of governing legislation, or like error going to the heart of the administrative determination, * * * judicial relief is obtainable" (emphasis added). *Barger* v. *United States*, 170 Ct. Cl. 207, 214 (1965). *See also Ainsworth* v. *United States*, 180 Ct. Cl. 166 (1967).

The Back Pay Act, 5 U.S.C. § 5596(b) (1970), now provides the vehicle for allowing back pay for an improper reduction-in-force. That statute authorizes such compensation for an employee "found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee." The Act applies, as here, to an employee determined by this court to have undergone such an unjustified or unwarranted personnel action. *Ainsworth* v. *United States*, 185 Ct. Cl. 110, 116–19, 399 F. 2d 176, 180–81 (1968).

Plaintiff is not, however, entitled to the pay of his original GS–13 position because he has given up the claim that his GS–13 job should not have been abolished and has sought only the pay of the GS–12 post to which he asserts he should have been assigned when the GS–13 was eliminated. *Cf. Chappelle* v. *United States*, 168 Ct. Cl. 362 (1964); *Kozak* v. *United States*, *supra*. On that basis plaintiff's motion for summary judgment is granted and defendant's is denied. Plaintiff is entitled to at least the equivalent of GS–12 pay from the time he began to be paid as a GS–7. He is also entitled, under the Act of August 29, 1972, Pub. L. No. 92–415, 86 Stat. 652, 28 U.S.C. § 1491 (Supp. III, 1973), to be reinstated in one of the GS–12 Electronic Engineer positions he sought or in another GS–12 position for which he is qualified.[19] The determination of the amount of plaintiff's recovery will be made under Rule 131(c).[20]

[19] Unless the agency can clearly show, in further proceedings before the trial judge, that plaintiff would have been reduced in force by the present time, even if he had been given one of the GS–12 positions in 1973. *See Kozak* v. *United States*, *supra*.

[20] Plaintiff claims interest prior to judgment but that is not allowable since no statute so provides in this kind of case. *See* 28 U.S.C. § 2516(a) (1970). Attorney's fees, also claimed, are likewise not allowable. *See* 28 U.S.C. § 2412 (1970). As for costs, this court has, as a matter of practice, not given costs to either side.

Syllabus

543 F.2d 142

ELDON E. BAUER *v.* THE UNITED STATES

[No. 102–74. Decided October 20, 1976]

ON THE PROOFS

Taxes; penalties; failure to pay employment taxes; responsible person; willfulness.—This is a tax refund suit to recover a sum paid by plaintiff in partial satisfaction of a 100% penalty assessed by the Internal Revenue Service for failure to pay over withholding taxes with respect to wages paid to employees during the last two calendar quarters of 1970 by the corporation of which plaintiff was vice-president and a director. Fiscal affairs were the responsibility of the president and treasurer. Plaintiff's duties with the corporation were entirely technical in nature. On the basis of the facts, it is *held* that plaintiff was not a person under a duty to collect, account for and pay over withholding taxes since he had no control over the financial affairs of the corporation; nor, therefore, was he a person who willfully failed to discharge such a duty. Plaintiff is entitled to recover and judgment is entered for plaintiff with the amount of recovery to be determined pursuant to Rule 131(c). Defendant's counterclaim for the balance of the assessment is dismissed.

Taxes; penalties; failure to pay employment taxes; responsible person.

[1] Where plaintiff, corporate vice-president and director, had no authority to act in or responsibility for the preparation or payment of employee payroll, withholding taxes or other employee deductions, he did not have custody or control of the corporate books, he never signed corporate checks, he was never consulted and did not make decisions with respect to priority of payments to creditors, he had no written information of the corporation's overall financial condition or its delinquency in employee withholding taxes, he was never involved in corporate banking transactions, and in contrast his duties were entirely technical in nature, plaintiff was not a person under a duty to collect, account for and pay over withholding taxes, and therefore, was not a person who willfully failed to discharge such duty nor one who attempted to evade or defeat such taxes or the payment thereof within the contemplation of the Code.

Internal Revenue ⇐ 2332

Taxes; penalties; liability for penalties; person responsible.

[2] A responsible person within the contemplation of 26 U.S.C. §§ 6671 and 6672 is a person having the ultimate authority over expenditures of funds, whether the authority extends to payment of employee withholding taxes or determination as to what bills or creditors should or should not be paid and when.

Internal Revenue ⇐ 2332

Opinion of Trial Judge

Taxes; penalties; failure to pay employment taxes; responsible person; willfulness.

[3] For purposes of 26 U.S.C. §§ 6671 and 6672, the failure of a person having the requisite duty to pay over any tax imposed by the Code must be willful. Responsibility without willfulness is not enough. Mere negligence in failing to ascertain facts regarding a tax delinquency is insufficient to constitute willfulness under the Code.

Internal Revenue ⟸ 2345

John Kevin Mahoney, attorney of record, for plaintiff. *Harris, Beach and Wilcox*, of counsel.

Patricia B. Tucker, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. *Theodore D. Peyser and Robert S. Watkins*, of counsel.

Before COWEN, *Chief Judge*, DAVIS and BENNETT, *Judges*.

PER CURIAM: This case comes before the court on defendant's motion, filed July 22, 1976, pursuant to Rule 141(b), requesting that the court adopt, with a modification, the recommended decision of Trial Judge Louis Spector, filed June 16, 1976, pursuant to Rule 134(h), as the basis for its judgment in this case. Upon consideration thereof, without oral argument, it appears that plaintiff has filed no intention to except to the trial judge's recommended decision and that the time for so filing pursuant to the Rules of the court has expired. Since the court agrees with the trial judge's recommended decision (with the modification requested by defendant), as hereinafter set forth*, it hereby affirms and adopts the same as the basis for its judgment in this case. Therefore, it is concluded that plaintiff is entitled to recover and judgment is entered for plaintiff with the amount of recovery to be determined pursuant to Rule 131(c). Defendant's counterclaim is dismissed.

OPINION OF TRIAL JUDGE

SPECTOR, *Trial Judge:* This is a tax refund suit to recover the sum of $421.35, plus interest, paid by plaintiff in partial

*Whereas the court adopts the trial judge's separate findings of fact which are set forth in his report filed June 16, 1976, they are not printed herein since such facts as are necessary to the decision are contained in his opinion.

satisfaction of a 100 percent penalty of $69,022.39 assessed by the Internal Revenue Service. The defendant has counterclaimed for the balance of the assessment, plus interest, and a lien fee.

Resolution of the case hinges upon application of the relevant facts, to the following pertinent provisions of the Internal Revenue Code of 1954:

> RULES FOR APPLICATION OF ASSESSABLE PENALTIES
>
> (a) *Penalty Assessed as Tax.*—The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary or his delegate, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.
>
> (b) *Person Defined.*—The term "person", as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member *is under a duty to perform the act in respect of which the violation occurs.* [26 U.S.C. § 6671. Emphasis supplied.]
>
> FAILURE TO COLLECT AND PAY OVER TAX OR ATTEMPT TO EVADE OR DEFEAT TAX
>
> Any person *required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof,* shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable. [26 U.S.C. § 6672. Emphasis supplied.]

Plaintiff's former employer, Management and Technology, Inc. (hereinafter MATI), failed to pay over withholding taxes with respect to wages paid to employees of MATI during the last two calendar quarters of 1970. The 100 percent penalty has been levied by IRS against plaintiff individually on the grounds that he was a person, within the contemplation of the code above-quoted, under a *duty* to collect and pay over these withholding taxes, but that he *willfully* failed to

do so. This case, therefore, has essentially two issues—was plaintiff's position with MATI during the pertinent period such that he had the *duty* to collect and pay over taxes within the meaning of the code; and, if such a duty is found to exist, was plaintiff's failure to discharge that duty *willful*.

MATI, as the employer, was required to withhold income and Federal Insurance Contributions Act taxes from the salaries of its employees. 26 U.S.C. §§ 3102(a), 3402(a). Taxes thus withheld by an employer are deemed to be held in trust for the United States, and must be paid over to IRS at the end of each calendar quarter. To insure collection and payment of these withholdings, the code imposes the above-described 100 percent penalty, equal to the amount of the taxes which are not so collected and paid over. The penalty is imposed on all responsible persons who, by virtue of their status within the employer-business, had fiscal control such as to invest them with the duty to collect and pay over withholding taxes. It is defendant's position that plaintiff was such a person.

On the same grounds, defendant is also seeking to collect the same 100 percent penalty (which it may collect, however, only once), from Richard C. Williams, then president of MATI, and from John Rodgers, then secretary-treasurer of MATI. Their litigation is currently pending in the U.S. District Court for the Western District of New York.

Plaintiff has had a long career in the photofinishing aspects of the photography business. In the early 1960's he became a director of a company called A & R Color Labs, Inc. (hereinafter A & R). Thereafter, in approximately August 1968, plaintiff became president and a shareholder of A & R. A & R was in the business of developing film and making color print products for the professional photographic trade. Plaintiff's work experience for over 30 years prior to the period in question has been entirely of a technical, and not of a fiscal, nature. His training and experience have been directed primarily toward the production functions of photofinishing.

While president of A & R, his duties had similarly been of a technical nature, and he relied upon the treasurer and comptroller of A & R, one Donald Sand, to handle the financial and accounting affairs of the company, including prep-

aration of financial statements, tax returns, and the filing and payment of taxes. In October 1968, plaintiff was asked to become a director of MATI. He was not duly elected a director. However, he served as a director, participated in most MATI board meetings, and erroneously believed that he had been properly elected to that office as of October 1968.

In 1968 MATI consisted of an optical division and a photographic bellows division, both the continuations of two separate businesses earlier acquired by MATI. Then in 1969, MATI acquired A & R in an exchange of stock, as the result of which plaintiff became the owner of over 200,000 shares of MATI, making him one of the company's five largest shareholders. Thereafter, plaintiff's former company, A & R, was operated as a subsidiary of MATI. The professional photofinishing business of A & R remained essentially the same after its acquisition by MATI, as it had been prior to that acquisition. Plaintiff retained his title as president of A & R. He also became manager of operations for the photofinishing division of MATI, which was comprised of A & R, and the two other similar businesses previously acquired by MATI.

As manager of operations for MATI's photofinishing division, plaintiff's duties remained as they had always been, technical in nature. He was in charge of production, quality control, and scheduling. All of the accounting and financial affairs of A & R, and of the two previously acquired businesses, were assumed and performed by MATI. The treasurer of A & R, Donald Sand, became treasurer of MATI following the acquisition, and he continued to be responsible for preparing and filing quarterly employment tax returns, and paying the withholding taxes. As treasurer, he reported directly to the president, Richard C. Williams.

Mr. Williams had become president of MATI in approximately 1967. He thereafter continued in that office through the last two quarters of 1970, the period in question. He was also chairman of the board. Williams had, before coming to MATI, been the treasurer and comptroller of another business where he was responsible for and was familiar with the preparation, signing and filing of corporate tax returns.

MATI was under-capitalized from its inception and Wil-

liams engaged in constant efforts to obtain additional operating capital. As early as February 1970, he was aware that MATI was not currently meeting its employee withholding tax obligations. The company was also plagued by substantial debts throughout its existence. This condition was common knowledge, and was known to plaintiff who, with other members of MATI management, had personally borrowed funds in 1968 totaling $100,000. The company did not meet the interest payments and, in May 1970, converted these loans, including plaintiff's, to MATI stock.

During the year 1970 the business affairs of MATI were conducted in a lax, informal manner, without the customary corporate formalities. There were no shareholder meetings during that year, and no written notice of a board of directors' meeting was issued by the secretary in 1970. No formal meetings of the board of directors took place after January 7, 1970. During the last two quarters of 1970 there were only two directors of MATI although the by-laws required three. An executive committee of the board, formed in January 1970, was not duly constituted since it contained only two director-members, and the MATI by-laws required at least three. No formal financial reports were prepared for MATI directors on a regular or current basis during 1970, nor were they issued information concerning delinquent employee withholding taxes.

Although he had served without the requisite formalities as if he were a director of MATI since October 1968, plaintiff did not properly assume that office until January 1970 at the annual board meeting, by appointment of the board, as distinguished from election by the stockholders. Plaintiff was also made vice president at that meeting, and also appointed to the executive committee.

In June 1970, John Rodgers, earlier mentioned as a party with Williams in parallel litigation before the U.S. District Court, became secretary-treasurer of MATI upon the resignation of treasurer Donald Sand. He remained in that position during the period in question. Under the MATI by-laws, Rodgers, as treasurer, had responsibility for keeping financial records, disbursing funds and reporting on the financial condition of the corporation. He reported directly to the

president, Williams, and was under his direct supervision. Rodgers was familiar with the procedure for purchasing depository receipts as a method of paying employee withholding taxes, and had the responsibility for preparing the tax returns, and seeing that they were properly signed and filed. The actual preparation of checks and the computation of payroll accounts for MATI was handled by subordinates under Rodgers' direction.

Employment and withholding taxes were not currently paid to IRS during any quarter of 1970. MATI's president, Williams, was aware of this delinquency early in 1970. Rodgers learned of it when he took office in June, and he went directly to Williams to discuss the matter. In an effort to resolve the problem of delinquent taxes, Williams, secretary-treasurer Rodgers, and the prior treasurer, Donald Sands, had a series of meetings with personnel from IRS. Plaintiff did not attend these meetings. As a result of the meetings, MATI made periodic lump-sum payments to IRS which were credited against delinquencies for the first and second calendar quarters of 1970. No written agreement was entered into with the representatives of IRS.

It was Williams' understanding that MATI would not be shut down by IRS if the agreed amounts were paid. Williams understood that MATI was not relieved of its liability for the delinquent or current taxes, by virtue of the periodic payments. Neither Williams nor Rodgers were told by IRS that MATI did not have to make current payments, while making up payments on the delinquent taxes for prior quarters. Plaintiff knew of the meetings with IRS but was not aware of the specific nature of the tax problem, nor of the specific results of the meetings.

Rodgers first informed plaintiff of the specific tax problem, the employee withholding tax delinquencies, in December 1970, which is at the end of the period in question here. Prior to that time, as early as spring 1970, plaintiff was aware of an outstanding tax liability but was not aware of the specific details of that liability nor of the specific details of the oral understanding that had been reached with IRS by Williams and Rodgers. Plaintiff was not told until December 1970, the end of the period in question, of the arrangement with the

Internal Revenue Service, and he thereafter assumed Rodgers and Williams were carrying out the payment arrangements they had agreed upon with respect to these delinquencies.

Both the regular and executive payrolls of MATI during the period in question were prepared under the direction and supervision of Rodgers who received all information on employee deductions, including withholding taxes. When sufficient funds were available, Rodgers would prepare a corporate check to cover employee withholding taxes and other employee deductions. Frequently there would be insufficient funds to cover all employee deductions and withholding taxes, and Rodgers would then direct that funds be disbursed to other employee deductions while employee withholding taxes remained unpaid. In doing so, Rodgers was aware that current payments of employee withholding taxes were not being made during the period in question. Plaintiff was not involved in the preparation or payment of employee payroll, or employee withholding taxes, or other employee deductions. Plaintiff never prepared, signed nor filed any tax returns of MATI, nor did he ever participate in the preparation of a MATI financial statement.

As president of MATI, Williams was principally active in dealing with the demands of creditors. Most of his time was spent in trying to raise additional funds. He met with the creditors to discuss their accounts and make payment arrangements. He obtained loans for MATI during 1970 and personally granted rights to MATI stock. His acts were accomplished without formal board action. Plaintiff was generally aware of the deteriorating condition of the company, and of Williams' activities to remedy the situation. But plaintiff was consulted only when supplies for his photofinishing division were involved.

Rodgers directed and supervised a clerk in connection with the payment and accounting of MATI's accounts payable. Rodgers would direct which creditors of MATI should be paid, and the amount of such payment, from a list of vendor invoices prepared by the clerk, and from a list of critical creditors which Rodgers prepared personally. The decision on whom to pay was reached by Rodgers and Williams and, only to the extent that supplies for his photofinishing divi-

sion were involved, was plaintiff consulted. The clerk in charge of the payment and accounting of MATI never received instructions or directions for the payment of creditors from anyone in MATI other than Rodgers. As previously observed, plaintiff was aware of the seriousness of MATI's finances throughout 1970, because the photofinishing division was not receiving the materials it required in order to continue at full production and, furthermore, it was common knowledge that MATI had run out of current operating funds. Plaintiff knew that some suppliers had put MATI on a cash basis.

Plaintiff did not order supplies directly from vendors. Rather his subordinates in the photofinishing division submitted purchase order requests directly to Rodgers and not to plaintiff. Plaintiff did not even have any direct contact with the major supplier of the photofinishing division, the Eastman Kodak Company. When problems arose with the MATI account, representatives from Kodak met or spoke with Rodgers and, on occasion, with the president, Williams. It was Rodgers who generally handled creditor calls. These calls would be discussed with Williams but plaintiff would be consulted only to the extent the call related to the supplies of the photofinishing division, or if his technical expertise in the photofinishing area was required. Plaintiff was not asked, and did not make decisions with respect to the payment of creditors, including Kodak, but rather was asked his opinion on how much and which of the supplies that had been ordered from a creditor were absolutely necessary to continue production in the photofinishing division. Rodgers then made decisions with respect to the ordering of supplies and materials based on the availability of funds.

All of the negotiations for preserving MATI's line of credit with Kodak were conducted by Rodgers and not by plaintiff. Kodak representatives did not look to plaintiff but rather to Rodgers or Williams with respect to financial problems or credit arrangements.

Plaintiff and one William Spencer, the manager of the Spencer Photo business earlier acquired by MATI, were frequently advised during the period in question by Williams and Rodgers that there were insufficient funds to obtain all

requested supplies and materials. On one occasion plaintiff advised Spencer, when the latter was having trouble getting supplies that plaintiff had nothing to do with the financial aspects of the company and that Spencer would have to go through Williams, which he then proceeded to do.

During the period in question plaintiff did not receive any written information which made reference to the overall financial condition of MATI or to its delinquency in employee withholding taxes although these problems were generally known throughout the company. Plaintiff did not have control, custody, or possession of the books, records, or checkbooks of MATI. Although plaintiff, Williams, and Rodgers were each authorized by the board (by an act which, characteristically, did not conform to the provisions of the bylaws) to deposit and withdraw funds and incur liabilities on behalf of the corporation, as well as to conduct all other banking transactions as might be necessary in carrying out their duties and, while they signed signature cards relating to two MATI accounts including one entitled "Payroll Account," plaintiff never actually signed a corporate check of MATI, nor was he ever involved in any of its banking transactions.

In January 1971, MATI want into bankruptcy, still having failed to pay over the taxes which it collected from its employees for the last two quarters of 1970. Thereafter, plaintiff was assessed the penalty which is the subject of this litigation, and of parallel litigation involving Williams and Rodgers in the U.S. District Court. Following bankruptcy, plaintiff purchased the assets of A & R and continues to operate that business today.

The foregoing facts are essentially undisputed. Where the parties would in certain minor respects suggest a different emphasis or inference, their differences have been weighed, and also measured against the testimony of disinterested witnesses not directly involved in this litigation nor in the parallel suit in the U.S. District Court.

It is concluded on the basis of these facts that plaintiff was not a person under a duty to collect, account for, and pay over withholding taxes with respect to wages paid to employees of MATI; nor, therefore, was he a person who willfully failed to discharge such a duty, nor a person who willfully at-

tempted to evade or defeat such taxes or the payment thereof, within the contemplation of the cited code provisions.

This type of case is especially dependent upon its facts. Prior decisions are principally useful for comparison on their facts and to illustrate the type of facts which are ordinarily highlighted and emphasized. In *White* v. *United States*, for example, it was observed that:

> Since the courts are looking for the person who could have seen to it that the taxes were paid, sometimes they just speak more generally about general policy-making authority or *fiscal* control, instead of pointing more explicitly to authority to direct payment of creditors. Thus, in *United States* v. *Strebler*, 313 F. 2d 402 (8th Cir. 1963), the court decided that the corporation's president was the person responsible for collecting and paying over taxes withheld because he had the authority to act, and did act, as *fiscal* manager of that company's affairs, and exercised authority over the general policy, affairs, and *finances* of the corporation.
>
> Both approaches would seem to amount to the same thing—*a search for a person with ultimate authority over expenditures of funds* since such a person can fairly be said to be responsible for the corporation's failure to pay over its taxes. In *Bloom* v. *United States*, *supra*, the court tied the two together in holding the president of the corporation involved there to be the responsible person, since he was in charge of the entire operation, made the final decisions, and decided what creditors were, or were not, to be paid. [Emphasis supplied.[1]]

Plaintiff does not fit these definitions. He was at best only a nominal figure of authority in the fiscal area. Mere office holding of and by itself does not render one responsible for the collection and paying over of employee withholding taxes.[2]

In each case in this court in which a person was found to possess the requisite "duty" under section 6672 of the code, it has been established by the evidence that he actually signed

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[1] 178 Ct. Cl. 765, 772, 372 F. 2d 513, 517 (1967).

"* * * For this reason, as the Government points out in its brief, a responsible person is most frequently defined as a person who has 'the final word *as to what bills or creditors should or should not be paid* and when.'" [Citing cases. Emphasis supplied. 178 Ct. Cl. at 771, 372 F. 2d at 516.]

[2] *Monday* v. *United States*, 421 F. 2d 1210, 1214 (7th Cir. 1970), *cert. denied*, 400 U.S. 821.

or cosigned corporate checks.[3] Aside from the fact that this plaintiff's "authority" to sign checks was not in accordance with the company's by-laws, the evidence establishes that he never had custody of nor control over the corporate checkbook, and never in fact signed a corporate check.

Another important factor is to determine who was responsible for preparation and payment of the payroll.[4] This function was performed only by Rodgers, or by persons under his supervision. The payroll clerk specifically testified that when there were insufficient funds to pay employee withholding taxes and other debts, she would on occasion be directed by Rodgers to apply the withholding taxes to other debts. Plaintiff had nothing to do with payroll. He was not authorized in the by-laws or in actual practice to act in that area.

Rodgers, furthermore, signed and filed quarterly employment tax returns, and reported directly to Williams on such matters. As a former treasurer and comptroller, Williams was also conversant with fiscal affairs, in contrast with plaintiff whose experience, skills and duties were and always had been technical in nature. The meetings with IRS representatives were with Williams and Rodgers, not with plaintiff, and he was dependent on the president and treasurer for information about, and the resolution of those tax problems.

Nor did plaintiff have "the final word as to what bills or creditors should or should not be paid and when." [5] All bills were paid by a clerk under Rodgers' supervision, and it was he who directed the priorities when funds became insufficient. Nowhere in the record is it suggested that Williams or Rodgers asked plaintiff whether the bills of specific suppliers should or should not be paid, and plaintiff did not have that ultimate decision-making authority. He would be consulted if supplies for his division were involved, in the hope that he could settle for less and still maintain production. Significantly the largest supplier, Kodak, sought out Williams and Rodgers, not plaintiff, when they had a problem.

[3] *See & cf. White*, note 1 *supra; Burack* v. *United States*, 198 Ct. Cl. 855, 461 F. 2d 1282 (1972); and *McCarty* v. *United States*, 194 Ct. Cl. 42, 437 F. 2d 961 (1971).

[4] *See & cf. Ponkey* v. *Campbell*, 62–1 U.S.T.C. ¶ 9242 (N.D. Texas 1961), in which it was highlighted as the most important factor, in the instructions to the jury.

[5] *See* note 1 *supra*. In *White*, the plaintiff signed all corporate checks, supervised the bookkeeping, directed the preparation of payroll and paid employees.

In short, plaintiff was an outsider with respect to the financial and fiscal affairs of the company. He did not meet with representatives of the bank which was principally concerned with MATI's financial condition and, without plaintiff's approval, Williams sold major corporate assets and obtained a loan by granting rights to acquire MATI stock.

The courts recognize the normal division of and limitations on authority exercised by various representatives of a particular business, as illustrated in *Bernardi* v. *United States*.[6] There the 100 percent penalty was asserted against three persons but one of these (Lutz) whose authority in fiscal affairs, incidentally, was greater than that of plaintiff's in this case, was held not responsible. He was a vice president, director, and shareholder of a corporation, and in charge of operations. He had no responsibility for payroll nor in determining creditor priorities. He had nothing to do with keeping tax records or making out tax returns. Lutz was, however, authorized to sign corporate checks, and did so. He actually signed the employer's quarterly tax returns for the quarters at issue, had intimate knowledge of the corporation's financial problems and met with the accounts receivable factor to discuss credit arrangements.

In *Bernardi*, the court held that Bernardi, the treasurer, and one Richter, the chairman of the board, had the requisite duty to pay the taxes, but not Lutz. As to the latter, the court observed:

> * * * If Lutz had decided that withheld taxes should be segregated or paid over to the Government immediately, he could have implemented that decision only by persuading Bernardi or Richter, or both, to segregate funds or to pay the taxes.[7]

That observation would be even more appropriate in this case where plaintiff had comparatively less knowledge and actual authority in the financial and tax affairs of MATI.[8]

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[6] 74–1 U.S.T.C. ¶9170 (N.D. Ill. 1973), *aff'd* 507 F. 2d 682 (7th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

[7] Note 6 *supra*, 74–1 U.S.T.C. ¶9170 at 83,215.

[8] *In accord, Campbell.* v. *Nixon*, 207 F. Supp. 826 (E.D. Mich. 1962); *Gurvey* v. *United States*, 66–1 U.S.T.C. ¶9142 (N.D. Ill. 1965); *Lauinger* v. *Scanlan*, 65–1, U.S.T.C. ¶9336 (E.D. N.Y. 1965); *Mattox* v. *United States*, 59–1 U.S.T.C. ¶9286 (D.C. Minn. 1959); *Sperry* v. *Tomlinson*, 58–2 U.S.T.C. ¶9549 (S.D. Fla. 1958). *Contrast Scott* v. *United States*, 173 Ct. Cl. 650, 354 F. 2d

Conclusion of Law

It should perhaps be further noted that even if it were assumed, *arguendo*, that plaintiff in this case had the requisite "duty" within the contemplation of the code, his failure to discharge that duty must also have been "willful," if he is to be held liable for the penalty. It has been held that "[f]or the purposes of the statute, the individual must be responsible and his failure willful. Responsibility without willfulness is not enough."[9] The facts fall far short of demonstrating the requisite "willfulness" on plaintiff's part even if it were found (which it is not) that he was chargeable with the requisite "duty." Mere negligence in failing to ascertain facts regarding a tax delinquency is insufficient to constitute willfulness under the code.[10]

On the basis of the evidence, it is concluded that judgment should be entered for plaintiff, and that defendant's counterclaim should be dismissed.

CONCLUSION OF LAW

Upon the trial judge's findings and opinion, which are adopted by the court, the court concludes as a matter of law that plaintiff is entitled to recover and judgment is entered to that effect with the amount of recovery reserved for further proceedings under Rule 131(c). Defendant's counterclaim is dismissed.

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292 (1965), and the cases cited in note 3 *supra*, in all of which the persons held responsible were directly experienced and intensively engaged in the fiscal and tax affairs of their respective companies.

[9] *McCarty*, note 3 *supra*, 194 Ct. Cl. at 53–54, 437 F. 2d at 967. Willfulness has been defined in *White*, notes 1 and 3 *supra*, as "a deliberate choice voluntarily, consciously and intentionally made to pay other creditors instead of paying the Government." [178 Ct. Cl. at 778, 372 F. 2d at 521.]

In *Monday*, note 2 *supra*, it is similarly defined as follows:

"An act is willful if it is voluntary, conscious and intentional. If you find that plaintiff * * * knowingly used available funds to prefer other creditors over the United States, then you must find that he acted willfully." [421 F. 2d at 1216.]

[10] *Levy* v. *United States*, 140 F. Supp. 834 (W.D. La. 1956).

ORDERS

No. 261–74. AUGUST 4, 1976

Farm & Home Aluminum Products, Inc.

Pleading and practice; discovery; production of documents.—On August 4, 1976 the court entered the following order:

Joseph J. Lyman, attorney of record for plaintiff.

James L. Malone III, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant.

Before COWEN, *Chief Judge*, DAVIS and BENNETT, *Judges*.

"This case comes before the court on Defendant's Request for Review of the July 8, 1976 order of trial Judge C. Murray Bernhardt. The order granted plaintiff's motion for production of 116 individual income tax returns (forms 1040 and 1040 SE) filed for the taxable years 1972 and 1973 by the individuals named in Exhibit A attached to Plaintiff's Response. Upon consideration of the request and plaintiff's response thereto, the court finds that the request for review should be granted to the extent hereinafter set forth.

"The court concludes that defendant should not be required to produce the tax returns for inspection and copying by plaintiff, but that plaintiff is entitled to information contained in the returns which indicates whether the individuals considered that they were self employed. In its Reply to Plaintiff's Response to Defendant's Request for Review of the Trial Judge's Order, the defendant has offered to prepare and furnish to plaintiff a schedule indicating (1) whether each individual filed a Form 1040SE, and (2) a schedule showing whether any of the individuals whose employment status is in issue described such employment status in tax returns in a manner which would lead to the conclusion that the individual considered himself employed or self

employed. The defendant has also offered to submit the returns to the trial judge for his *in camera* inspection and correlation with the schedules which defendant has agreed to prepare and furnish. Defendant further agrees that if defendant prevails in this case it will prepare a schedule detailing the exact credit to be allowed plaintiff as a result of the fact that taxes not withheld from its employees were actually paid to the Federal government and that this schedule be subject to an *in camera* review by the trial judge.

"Since the court finds that defendant's offer will, with slight modifications, provide the relevant information which plaintiff is entitled to discover without requiring an unnecessary disclosure of material contained in the individual tax returns, IT IS ORDERED as follows:

"1. As soon as possible after the issuance of this order the defendant shall prepare and deliver to the plaintiff: (a) A schedule which shows, with respect to each of the individuals listed in plaintiff's Exhibit A, whether he filed a Form 1040-SE return for 1972 and 1973 and whether or not he listed plaintiff as a source of income reported therein, or whether he listed income equal to that set forth in Internal Revenue Service Form 4688, and (b) a schedule for each of the individuals described in (a) above showing whether he described his employment status in the tax returns as "self employed" or in any other manner indicating that such individual considered himself employed or self employed.

"2. The defendant shall deliver all of said tax returns and copies of said schedule to the trial judge for his *in camera* inspection and correlation with the information provided in the schedules to be furnished to plaintiff as described in paragraph 1 above.

"3. If defendant prevails in this action, it shall prepare and furnish to plaintiff a schedule detailing the exact credit to be allowed plaintiff as a result of the fact that taxes not withheld from its employees were actually paid to the Federal government. The time for the submission of the schedule shall be fixed by the trial judge and it shall be subject to his *in camera* review."

No. 195–74. AUGUST 20, 1976

Molony & Rubien Construction Co.

Contracts; defective specifications; latent ambiguity.—Plaintiff seeks Wunderlich Act review of a decision of the Armed Services Board of Contract Appeals (No. 18622 (unreported)), denying plaintiff's request for an equitable adjustment in contract price in payment for work claimed to represent added effort imposed by the Government—the supply and installation of steel framing supports for certain stair landings. On February 24, 1976 Trial Judge John P. Wiese filed a recommended opinion holding for plaintiff. (See 22 CCF para. 80110, reporting opinion in full.) Thereafter, this case came before the court on a stipulation of the parties stating that plaintiff agreed to accept $2,700.00 in full settlement of all claims set forth in the petition and amended petition, and that defendant consented to entry of judgment in that amount. On August 20, 1976 the court ordered that judgment be entered for plaintiff for $2,700.00.

No. 175–74. SEPTEMBER 3, 1976

John H. Price

Patents; infringement; use by or for the Government; authorization or consent to infringement.—On September 3, 1976 the court entered the following order:

John D. Pope III, for plaintiff.

Donald E. Townsend, with whom was *Assistant Attorney General Rex E. Lee*, for defendant United States.

John L. White, for third party defendants. *Millen, Raptes & White*, of counsel.

Before COWEN, *Chief Judge*, DAVIS and BENNETT, *Judges*.

"We have for our consideration plaintiff's request for review of the trial judge's recommendation that the petition be dismissed for lack of jurisdiction. In this request, both the Government and the third party defendants have joined.

"Plaintiff's amended petition alleged that his patent, a 'Method and Means for Cutting Trees,' had been infringed by the United States in that the Government permitted its con-

tractors to use infringing equipment. The contractors involved were noticed by the Government and filed a joint answer. The trial judge thereupon issued an order scheduling a pretrial conference for April 5, 1976.

"On January 28, 1976, the same date the trial judge's order was issued, the court rendered its decision in *Carrier Corporation* v. *United States*, 208 Ct. Cl. 678 (1976), which held that the United States is not liable to a patent holder for infringement, for alleged acts committed by contractors in the performance of a Government contract, unless the Government had authorized or consented to the use of the infringing equipment.

"The trial judge then issued an 'Order to Show Cause on Dismissal of Action Under Rule 102(b)(1).' This action was taken since the trial judge considered, in light of the *Carrier* decision, that plaintiff may not have stated a claim against the United States for which relief could be granted by this court. Plaintiff and all defendants responded to this order; a hearing was held on April 5, 1976, and oral argument followed. Testimony from witnesses and documentary vidence were received. Subsequently, the trial judge on his own motion, recommended dismissal of plaintiff's petition as amended, under Rule 102(b)(1). We treat his recommendation as one made under Rule 54(b).

"After the filing of his amended petition, plaintiff had ample opportunity to engage in discovery, and did so for the purpose of seeking evidence which would show that the Government had authorized or consented to the use by its contractors of equipment which infringed plaintiff's patent. However, plaintiff supported the unverified allegations of his petition only by his own affidavit which fails to state any facts showing that the contractors named in his petition used his apparatus with the authorization or consent of the Government. Furthermore, plaintiff failed to offer at the hearing any testimony or documentary evidence which would support the allegations of his amended petition.

"By contrast, the Government at the hearing presented two witnesses in its behalf and in addition, the contractors who allegedly used the infringed equipment, filed affidavits showing that no authorization or consent had been given by the

Government for the use of any such alleged infringing equipment.

"On the basis of the foregoing the court concludes that the recommendation of the trial judge should be adopted and that plaintiff's first amended petition should be dismissed for lack of jurisdiction.

"IT IS THEREFORE ORDERED that plaintiff's first amended petition filed August 4, 1975, be and the same is hereby dismissed.

"On May 19, 1976, after the filing of the trial judge's recommendation for dismissal of the petition, plaintiff filed a second amended petition, which in addition to the allegations of his previous petition, included paragraph 14A, in which he alleges that the Corps of Engineers has directly used apparatus which is alleged to be an infringement of plaintiff's patent, and this order is issued without prejudice to the resolution in future proceedings of the issue raised by said paragraph 14A. This portion of the case is remanded to the trial judge for his determination.

"This order is also issued without prejudice to plaintiff's rights to pursue any claims which he may have against the third party defendants in a court of competent jurisdiction."

No. 204–73. SEPTEMBER 10, 1976

Herman [I. Shaller

Civilian pay; resignation; voluntariness of resignation.—On September 10, 1976 the court entered the following order:

Robert J. Wieferich, attorney of record, for plaintiff.

R. W. Koskinen, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before COWEN, *Chief Judge*, DAVIS and BENNETT, *Judges*.

"This case comes before the court on defendant's motion for summary judgment filed June 10, 1976, against plaintiff's claim that his resignation from Government service with the Department of the Army was coerced and is thus invalid and that he is entitled to back pay. All administrative remedies and procedures have been fully exhausted. The Civil

Service Commission has found that plaintiff's resignation was voluntary. Plaintiff resists the pending motion on the grounds that it is premature, without foundation in the record and on the merits, and that questions of fact exist which preclude summary judgment. We resolve these issues against plaintiff.

"On October 1, 1969, plaintiff submitted what he termed a 'conditional resignation' to be effective April 4, 1970. It was rejected. On October 21, 1969, plaintiff submitted a resignation effective October 30, 1969, and it was accepted. Plaintiff represented in an appeal to the CSC that he was harassed into resignation by his superiors who conspired against him and engaged in capricious, malicious conduct in violation of the law and regulations. The Appeals Examining Office found no credible evidence to support the claim. The CSC Board of Appeals and Review reaffirmed that finding. Suit was filed but, by agreement of the parties, the court on November 8, 1973, suspended proceedings in order for a hearing to be held by the CSC on the issue of voluntariness of the 1969 resignation. A hearing was held and the Appeals Examinating Office decision was that plaintiff's resignation was voluntary but this decision was remanded for still another hearing on plaintiff's allegations of harassment. The hearing on remand was held and again the decision was that plaintiff's contentions were not supported by the evidence. The matter then went to the Appeals Board on the contentions raised below and that plaintiff had been denied a fair hearing because all of his prospective witnesses were not heard, that Government witnesses supported his claim, and that the findings were arbitrary and capricious and not supported by the record.

"In findings and an opinion dated March 20, 1975, now before the court, the board examined plaintiff's contentions. It was pointed out that several witnesses were heard and affidavits and exhibits were received. Although plaintiff had requested 83 witnesses, his complaints were directed mainly at two supervisors who were witnesses and another individual who was in Europe but whose affidavit was produced. These were the parties with personal knowledge and the other prospective witnesses were either cumulative or irrelevant. The

board concluded, and we agree, that the record was sufficiently complete and correct and that the plaintiff was not therein denied due process, as he alleges.

"On the issue of harassment as an element of coercion, there was admitted ill-will between plaintiff and his supervisors. The board found that this was due to plaintiff's unsatisfactory work. This was the cause of various suspensions of plaintiff and grievances filed by him. But, there is no credible evidence to support the claim of a coerced resignation, or lack of any choice of action but to resign, or any conspiracy to get rid of plaintiff. Plaintiff's own testimony supports the conclusion that he simply chose to extricate himself from what had become an unpleasant situation by resigning and protecting his annuity. He was informed by his own representative that he might be eventually removed for cause and this gave impetus to his decision to resign. Plaintiff was never officially advised by defendant that he would be discharged or removed through a reduction-in-force and so testified. It is plain that plaintiff's resignation was not induced by duress and that the judicially recognized tests for duress do not apply here. Plaintiff had an alternative. He could have stayed on the job and resisted whatever adverse action that might have come against him. He elected instead to resign and to protect his annuity against the contingency that he might be unsuccessful in contesting a potential adverse action. Plaintiff's resignation was not induced by coercive actions of defendant and he did not resign after accepting involuntarily any terms imposed upon him by defendant. We find no procedural defects in the administrative proceedings. We do find that those proceedings were carefully, extensively conducted and plaintiff's charges were thoroughly considered and rejected upon the clear weight of the evidence. The CSC decision was not arbitrary or capricious or in bad faith. No new questions of fact remain to be decided. The facts necessary to decide the pending motion are admitted and supported by plaintiff's own testimony.

"IT IS THEREFORE ORDERED, upon consideration of the pleadings, the defendant's motion for summary judgment, plaintiff's response thereto, and defendant's reply, without oral argument, and upon the authority of *Murphy* v. *United*

States, 209 Ct. Cl. 352 (1976); *Gratehouse* v. *United States*, 206 Ct. Cl. 288, 512 F. 2d 1104 (1975); *Autera* v. *United States*, 182 Ct. Cl. 495, 389 F. 2d 815 (1968); and cases cited therein, that defendant's motion be and it is granted. The petition is dismissed."

Plaintiff's motion to alter and amend judgment was denied October 28, 1976.

No. 162–76. SEPTEMBER 10, 1976

Hudson D. Harmon

Military pay; discharge; res judicata; laches; limitation of actions.—On September 10, 1976 the court entered the following order:

Hudson D. Harmon, pro se.

John W. Showalter, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before COWEN, *Chief Judge*, DAVIS and BENNETT, *Judges*.

"We have before us, submitted without oral argument, defendant's motion to dismiss plaintiff's petition on grounds that: the court lacks jurisdiction over plaintiff's claim; the claim is barred by the doctrine of *res adjudicata;* and the claim is barred by the statute of limitations, or, laches.

"Plaintiff has petitioned the court *pro se;* though the petition is extremely unclear, it appears that plaintiff feels wronged by the nature of his military discharge in September, 1941 and subsequent acts taken by the Department of the Army, the Social Security Administration, and the Veterans Administration. Plaintiff has alleged misconduct on the part of various Government officials in violation of the Constitution and federal statutes. We need not comment on the unsubstantiated nature of plaintiff's allegations since the alleged misconduct sounds in tort, which is outside the court's jurisdiction.

"Moreover, a nearly identical petition was filed by plaintiff in the United States District Court for the Northern District of California and was dismissed, on the merits, on Feb-

ruary 19, 1976. This dismissal is *res adjudicata* on the matters which plaintiff has raised in this court.

"To the extent plaintiff's petition is susceptible of understanding, the events which are said to give rise to his claim occurred more than 6 years ago; consequently, plaintiff's claim is barred by the statute of limitations. Even without application of the statute of limitations, plaintiff has tarried for 35 years in filing suit in this court and is barred by the doctrine of laches.

"For the foregoing reasons, defendant's motion to dismiss the petition is granted."

On November 26, 1976 the court denied plaintiff's motion to amend the dismissal of the case. On June 24, 1977 the court denied plaintiff's motion to reopen the case.

No. 426–74. SEPTEMBER 10, 1976

George B. Borchers

National Guard technician; civilian disability retirement; Reserve Officers longevity retirement; sick leave; administrative error.—On September 10, 1976 the court entered the following order:

Carl J. Felth, for plaintiff. *Jackson, Kennedy, Walters & Wheatley* and *Clarence D. Walters*, of counsel.

Donnie Hoover, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before COWEN, *Chief Judge*, DAVIS and BENNETT, *Judges*.

"This case comes before this panel of the court on defendant's motion for summary judgment and has been considered without oral argument, the active judges of the court having denied the plaintiff's suggestion that he be accorded an initial hearing en banc.

"Plaintiff's petition, affidavits, and documentation show the following: He was a National Guard Technician with the California Army National Guard, serving as State Aviation Officer; his military grade in the Army was colonel. As State Aviation Officer he was required to maintain qualifications

as a pilot; in 1971 he lost his flying status for medical reasons. Thereupon, since he could no longer remain as State Aviation Officer, he applied for and received disability retirement from his civilian position as a National Guard Technician. A short while later he applied for and received longevity retirement from the California National Guard under the 30-year-service provision of the Reserve Officers Personnel Act, 10 U.S.C. 3851(a).

"His difficulty centers on the sick leave appurtenant to his civilian position. At the time of his civilian disability retirement he was told by the Technician Personnel Officer of the California National Guard that he could utilize all unused sick leave before his civilian retirement became effective; this advice accorded with the Manual prepared by the California National Guard. However, the policy of the national office of the National Guard was that, in the case of a disability retirement, sick leave could only be used (if not previously exhausted) until final adjudication of the claim for disability retirement. This occurred in plaintiff's case on August 25, 1971, but he was nevertheless allowed to remain for some time on sick leave, *i.e.* until December 18, 1971, when his disability retirement was made fully effective. This did not exhaust his sick leave.

"A complicating factor was that his military retirement for longevity occurred earlier on September 4, 1971. This automatically made him ineligible for further employment as a civilian technician under 32 U.S.C. § 709(e)(1) which provided that he be 'promptly separated' from his technician employment once he was separated from his military position in the National Guard. An effort was made by the California National Guard to have the central office of the National Guard allow plaintiff to use all his sick leave before his civilian retirement became effective but this was refused by the central office on the basis of the policy and statutes just described. After this correspondence plaintiff was finally retired from his civilian job for disability on December 18, 1971. By that date he had used up a part of his sick leave but some 859 hours remained. He was given credit for his amount in the computation of his annuity

but was not paid for the leave. He now sues for that amount of unpaid sick leave, amounting to some $11,000.

"Plaintiff has no legal rights which we can vindicate. The statutes plainly require that technicians be members of the National Guard and call for 'prompt separation' of a technician who is separated from the National Guard. A National Guard regulation requires that such separations be within 30 days. Plaintiff retired in his military capacity from the Guard on September 4, 1971 and therefore could not remain as a civilian technician beyond October 3rd. (He actually stayed until December 18, 1971, and can therefore be said to be liable for his civilian pay between October 4th and December 18th, but the Comptroller General has officially waived recovery of that indebtedness.) It is, of course, settled that civilian employees of the Federal Government are not entitled to receive cash payments on retirement for unused sick leave (*see Burich v. United States*, 177 Ct. Cl. 139, 150, 366 F. 2d 984, 990–91 (1966), *cert. denied*, 389 U.S. 885 (1967)). They can have their unused sick leave used in calculating their annuities—but plaintiff has received that right.

"Defendant is not estopped by the erroneous advice given plaintiff by the California National Guard, advice which was, as pointed out above, directly contrary in the present circumstances to the governing legislation and regulations. *Montilla* v. *United States*, 198 Ct. Cl. 48, 457 F.2d 978 (1972); *Putnam Mills Corp.* v. *United States*, 202 Ct. Cl. 1, 9, 479 F.2d 1334, 1338 (1973); *Scharaga* v. *United States*, 209 Ct. Cl. 728 (1976); *Haight* v. *United States*, 209 Ct. Cl. 698, *cert. denied*, 429 U.S. 841 (1976).

"For these reasons, we must grant defendant's motion for summary judgment and dismiss the petition.

"There is, however, an equitable consideration which may possibly open the door for plaintiff to receive some relief through the Army Correction Board. When the California National Guard wrote the National Guard Bureau in Washington (before plaintiff's civilian retirement but after his military retirement) inquiring about the possibility of his receiving his full accumulation of sick leave, the answer from the national bureau came back in a letter covering one page

and a quarter of another page. On the first page the letter pointed out that plaintiff could not legally remain a civilian employee (or be paid his sick leave) for more than 30 days after his military retirement on September 4th. On the second page, however, the letter pointed out that 'if his assignment to the [military] retired reserve can be deferred and his National Guard membership continued he can be retained in a technician employee status and be given the advantage' of being kept in his civilian job until he had used up all his sick leave. This possibility of the extension of the military service of a National Guard technician (until age 60) was expressly authorized by 10 U.S.C. § 3851(c).

"The point about this letter is that plaintiff asserts, and backs up his assertion by affidavits, that the second page (containing this alternative way of allowing plaintiff to get the full advantage of his sick leave) was deliberately not shown by the California National Guard to plaintiff until after his civilian retirement had become effective in December 1971. Plaintiff says that, not being alerted to the military extension possibility, he made no effort before his civilian retirement to have his military retirement deferred or revoked (it had already taken place by the time the National Guard Bureau letter was written and received).

"As already indicated, plaintiff now has no legal rights vindicable in this court. However, under its broad charter, the Army Correction Board can alter his *military* retirement date—if it thinks the circumstances, including the alleged deception described above, warrant—by pushing that date forward so that if plaintiff's civilian employment were also extended it would cover all his sick leave. There is no comparable civilian correction board but the Federal Personnel Manual Supplement 990–2, Book 630, Subchapter S4, para. S. 4–2b(2), allows a civilian employee to be restored to a pay status after his separation for the purpose of granting sick leave if there has been an 'administrative error or oversight in the processing of a separation action.' If the Army Correction Board alters the date of plaintiff's *military* retirement, that provision of the Personnel Manual could possibly become applicable. (It may well be that plaintiff's annuity would have to be recalculated to exclude the accumu-

lated sick leave.) In these circumstances plaintiff may wish to apply to the Correction Board for relief with respect to his military retirement. The disposition we make today is without prejudice to such a course.

"IT IS THEREFORE ORDERED AND CONCLUDED that defendant's motion for summary judgment is hereby granted and the petition is dismissed."

No. 25–75 SEPTEMBER 10, 1976

André Gatson

Military pay; discharge for medical unfitness; Military Academy cadet; medical fitness standards.—On September 10, 1976 the court entered the following order:

Donald E. Moses, for plaintiff. *Dann, Rosenbaum, Bloom & Kaufman*, of counsel.

Howard G. Slavit, with whom was *Assistant Attorney General Rex E. Lee*, for defendant. *Neal Ellis*, of counsel.

Before COWEN, *Chief Judge*, DAVIS and BENNETT, *Judges*.

"Plaintiff was inducted into the Army in July 1973 and at the same time appointed to be a cadet at West Point. Prior to that, he was examined medically and determined by the Army to be fit for service. His own papers did not indicate that he had any disqualifying disease or defect. Shortly after he commenced training at the Academy in July 1973, he needed medical attention for symptoms which included dizziness, fatigue and weakness. This was repeated at least twice until he was admitted to the hospital for a prolonged stay early in October. At that time he was diagnosed, after further tests, as having sickle thalassemia, a form of permanent anemia which is congenital. A medical board recommended his discharge from the Academy and the Army for medical unfitness. This was done in November 1973, and he was given an honorable discharge.

"This suit, filed in 1975, challenges the discharge on the grounds that (a) the Army knew or should have known of plaintiff's physical condition before he was accepted for service and is therefore estopped from separating him after

he came to the Academy; (b) the Army employed the wrong regulation in separating him, and in any event misread the regulations; and (c) the plaintiff's blood condition was not so severe as to render him ineligible for service, and therefore the separation was arbitrary and capricious. Both parties have moved for summary judgment, but oral argument is deemed unnecessary.

"The documentation supplied by the parties, including communications from plaintiff's private physicians, make it absolutely clear that plaintiff did in fact suffer, when he was discharged, from the congenital blood ailment of sickle thalassemia. That documentation also demonstrates that the Army's medical officers did not know this when they accepted him for entrance into the Academy and that they were not put sufficiently on notice by any of the medical information available to them, including the material furnished by plaintiff and his own doctors. The most that was known was that plaintiff had sickle cell trait; the mere presence of that factor was not enough to require the Army to disqualify him. The Army did seek further information from Gatson's private doctor but was never given any information of a disqualifying nature. It follows that on this record the court need not even reach the claim that the defendant was legally estopped; even if that principle could be applicable to this kind of case, the necessary factual prerequisite is missing.

"Plaintiff's second point is that, though his discharge was processed under Chapter 2 ("Medical Fitness Standards for Appointment, Enlistment, and Induction") of AR 40–501, it should have been done under Chapter 3 ("Medical Fitness Standards for Retention, Promotion and Separation Including Retirement") which has generally more lenient qualifications. The persuasive answer is given in an affidavit by Colonel McCabe, Surgeon at the Academy at the time of Gatson's discharge. This affidavit says:

> When a cadet has entered the Military Academy and a medical disqualification is diagnosed, a determination must be made whether disqualifications of Chapter 2 or Chapter 3 of AR 40–501 apply. In October 1973 as Surgeon USMA, I had discretion under paragraph 2–2 (e), AR 40–501 to recommend that Chapter 3 disqualifi-

> cations apply in any given case. Chapter 3 disqualifications were usually reserved for cadets, who had spent some years at the Academy and in whom the government had invested much time and money. Because Chapter 3 standards are more lenient generally, we could retain these people and have them fulfill their commitments to the government. Chapter 2 disqualifications were normally applied to retention of cadets in whom little time and investment had been expended by the government. Chapter 2 applies in every case of retention of cadets except for those cadets whose conditions are diagnosed post entrance *and* for whom Chapter 3 disqualifications are recommended by the Surgeon USMA. Thus there are conditions diagnosed post entrance for which Chapter 2 will apply.
>
> In André Gatson's case a determination was made that Chapter 2 should apply because his condition (sickle thalassemia) was diagnosed post entrance and Chapter 3 retention disqualifications were not deemed suitable in view of his short time at the Academy and the nature of his condition.

Colonel McCabe adds that, if he had chosen to recommend Chapter 3 standards, Gatson would nevertheless have been medically disqualified for retention because he had the disqualifying defect of anemia. Plaintiff's contention that in any event the regulations must be read, once a cadet enters on duty, to permit his discharge for medical reasons without his consent only if the medical problem arose subsequent to the appointment cannot be squared with the wording of the regulations or with the obvious need to separate a cadet whose disqualifying disease did not happen to be detected in the pre-induction physical examination.

"As for the third point, we cannot say that the Army acted arbitrarily or capriciously in separating a cadet who had sickle thalassemia, a permanent form of anemia, which had obviously manifested itself during his initial period of plebe training. Although plaintiff's private physicians thought that he should nevertheless have been given an exception from disqualification, it is impossible for a court to say that the Army could not in its discretion make this disease a *per se* disqualifying defect, as it specifically did in Chapter 2 of AR 40–501. This is by no means a trivial defect, especially for an Army officer. There is, it may be added, no warrant

whatever in this record for even a suspicion that there was any other, ulterior, motive for the discharge.

"IT IS THEREFORE CONCLUDED that defendant's motion for summary judgment is granted, plaintiff's cross-motion is denied, and the petition is dismissed."

No. 36-75. SEPTEMBER 10, 1976

Eustace C. Mullins

Court of Claims jurisdiction; copyright infringement.— On September 10, 1976 the court entered the following order:

Eustace C. Mullins, pro se.

F. Louise O'Neil, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before COWEN, *Chief Judge*, DAVIS and BENNETT, *Judges*.

"This case is before the court on defendant's motion for summary judgment filed July 14, 1976, and plaintiff's cross-motion for summary judgment filed August 23, 1976. The petition asserts a claim for copyright infringement by the United States and damages of $500,000. The thrust of plaintiff's claim is that the defendant, by devious means employed by the Federal Bureau of Investigation, COINTELPRO, and the Central Intelligence Agency, caused his copyrighted books, 'Mullins on the Federal Reserve' and 'The Federal Reserve Conspiracy,' to be infringed by duplication and sales without payment of royalty. The former book is said to have been 'commissioned in 1949 by the poet Ezra Pound, held at that time as a political prisoner in St. Elizabeth's Hospital, Washington, D.C.' The case has been before the court on prior occasions and has also been the subject of consideration in the Trial Division.

"Defendant's motion asserts that the amended petition fails to state a claim upon which the court can grant relief, that the claim is not stated with sufficient particularity as required by the Rules, that the allegation of infringement against the United States is without foundation in probative fact, and that no genuine issue of material fact exists which

would prohibit summary judgment in defendant's favor. It is noted that plaintiff has not complied with orders to set forth the necessary facts to show infringement. The court ordered a more definite statement by plaintiff with identification by him of the employee, department or agency of defendant alleged to have infringed, and the sales by or on authority of the same, with time and place. This information has not been furnished. Plaintiff's answer to the pending motion states, in part:

> * * * Plaintiff agrees that this action cannot be brought to a just conclusion without fully exposing the shadow government of Zionist collaborators and Communists sympathizers, as well as the activists of the old Harold Ware cell of Communists in Washington. If these criminals can be brought to justice, plaintiff can afford the Court ample proof of the contentions of this action.

"It is plain to us that plaintiff has not stated facts sufficient to support a prima facie claim for copyright infringement against the United States. We have before us no documentation to support the plaintiff's broad allegations. There is no support for any assumption that any department, agency, or individual in defendant's employment or organization authorized by defendant has copied, sold, or otherwise infringed plaintiff's alleged copyright or copyrights within the 3 years next preceding February 10, 1975, or at any other time.

"Plaintiff's motion for summary judgment asserts that defendant 'is participating in and compounding a crime, the stated crime of conspiring to defraud plaintiff by selling plaintiff's books through government-controlled front groups without due compensation to plaintiff and by conspiring to cover up crimes.' Plaintiff also claims denial of due process and equal justice under law because defendant has not provided him with legal assistance to prosecute this action. Like the petition, the motion is unsupported by any evidence of record. No affidavits support the motion. Defendant has no responsibility to provide plaintiff with legal counsel to make claims against the Government. The motion is totally without merit.

"IT IS THEREFORE ORDERED that, upon consideration of the petition, defendant's motion for summary judgment and attached papers, plaintiff's answer to the motion, and plaintiff's cross-motion for summary judgment, without oral argument, and upon the authority of *Mazer* v. *Stein*, 347 U.S. 201, 218 (1954), *Sterner* v. *United States*, 193 Ct. Cl. 517, 434 F. 2d 656 (1970), *Dilatush* v. *United States*, 151 Ct. Cl. 405 (1960), and *Costello* v. *Loew's Inc.*, 159 F. Supp. 782, 783 (D.C. Cir. 1958), the defendant's motion for summary judgment is granted. Plaintiff's cross-motion for summary judgment is denied. The petition is dismissed."

No. 175–75. SEPTEMBER 10, 1976

C. H. Leavell and Company

Contracts; interpretation; ambiguity; necessity for seeking clarification; soil logs; subsurface conditions.—Plaintiff seeks review under Wunderlich Act standards of a decision of the Armed Services Board of Contract Appeals (reported at 74–2 BCA para. 10885 and, on reconsideration, at 75–1 BCA para. 11048) dismissing plaintiff's belated appeal requesting an equitable adjustment for additional expenses allegedly incurred due to unexpected amount of water seepage into the foundation borings for barracks buildings at Lackland Air Force Base during excavating and construction, even though the Government-furnished data concerning underground water was conflicting, because plaintiff failed to seek additional information concerning the conflicts. On June 9, 1976 Trial Judge C. Murray Bernhardt filed a recommended decision (reported in full at 22 CCF para. 80334) concluding that the Board correctly dismissed plaintiff's appeal. On September 10, 1976 the court, by order, adopted said recommended decision as the basis for its judgment in this case, concluded that plaintiff is not entitled to recover, denied plaintiff's motion for summary judgment, granted defendant's cross-motion and dismissed the petition.

No. 387-75. SEPTEMBER 10, 1976

SCM Corporation

Contracts; interest; attorney fees.—On September 10, 1976 the court entered the following order:

Louis W. Brydges, attorney of record, for plaintiff. *Diver, Brydges, Bollman, Grach & Riseborough*, of counsel.

Lawrence S. Smith, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before COWEN, *Chief Judge*, DAVIS and BENNETT, *Judges*.

"This case is before the court on defendant's motions for summary judgment and to dismiss. Plaintiff has sued for breach of contract for alleged failure of defendant to pay it $1 million, said to be due for certain technical data furnished by plaintiff under a Department of Army contract relating to manufacturing and patent rights in a teletypewriter system. It also claims interest, attorney fees and costs estimated at $363,200, due to defendant's 'gross bad faith and misconduct' in connection with the transaction. Defendant tells us that it has paid the $1 million to plaintiff since the petition was filed. This is now uncontroverted. Defendant charges that plaintiff has not stated a claim upon which relief can be granted as to the rest of the sums sought. We agree. The contract has no provision for payment of interest and no statute authorizes it in a case such as this. 28 U.S.C. § 2516 (1970). *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 589 (1947); *Bonnar* v. *United States*, 194 Ct. Cl. 103, 438 F. 2d 540 (1971). The claim for attorney fees likewise fails to state a claim upon which relief can be granted. Such fees are not recoverable in federal litigation absent statutory authorization. *Alyeska Pipeline Serv. Co.* v. *Wilderness Society*, 421 U.S. 240 (1975); *J. E. Robertson Co.* v. *United States*, 194 Ct. Cl. 289, 437 F. 2d 1360 (1971); *Dittmore-Freimuth Corp.* v. *United States*, 182 Ct. Cl. 507, 390 F. 2d 664 (1968). 28 U.S.C. § 2412 likewise bars attorney fees and this court has not allowed costs under that section either. 28 U.S.C. § 2516 bars payment of interest except under a contract or statute expressly providing for payment thereof.

Neither exists to help plaintiff here. Plaintiff says, however, that the court's equitable powers are inherent and sufficient to allow its claim. The Court of Claims is a court whose jurisdiction is limited by statute and it does not have such equitable powers as plaintiff claims. *United States* v. *King*, 395 U.S. 1 (1969). Plaintiff's charge that defendant is guilty of "gross bad faith and misconduct" also suggests a claim in tort over which this court has no jurisdiction. 28 U.S.C. § 1491 (1970); *Myers* v. *United States*, 206 Ct. Cl. 863 (1975); *Algonac Mfg. Co.* v. *United States*, 192 Ct. Cl. 649, 428 F. 2d 1241 (1970); *Williamson* v. *United States*, 166 Ct. Cl. 239 (1964). Authorities relied on by plaintiff are inapposite.

"IT IS THEREFORE ORDERED that, upon consideration of the defendant's motions for summary judgment and to dismiss, plaintiff's response thereto, and defendant's reply, without oral argument, the said motions are granted. The petition is dismissed."

No. 397–75. SEPTEMBER 10, 1976

Wendal Gordon, et al.

Eminent domain; taking; navigational servitude.—On September 10, 1976 the court entered the following order:

Lee Huddleston, attorney of record, for plaintiffs. *Philip Huddleston*, of counsel.

C. David Redmon, with whom was *Acting Assistant Attorney General Floyd L. France*, for defendant.

Before COWEN, *Chief Judge*, DAVIS and BENNETT, *Judges*.

"This case is before the court on defendant's motion for summary judgment, and plaintiffs' opposition thereto, which has been considered without oral argument. Plaintiffs in this action are seeking compensation under the Fifth Amendment for an alleged taking of their land by the United States. The tract involved is an island, located in the Ohio River; the land consists of some 116 acres above the ordinary high water mark. These 116 acres were condemned by the United States as part of the Smithland Locks and Dams Project

in the Ohio River. Compensation was paid to plaintiffs pursuant to the condemnation.

"Plaintiffs claim, under their state's law, an interest in the remaining approximately 1,200 acres of the island which lie between the ordinary high water mark and the ordinary low water mark. These acres are usually under water. Defendant admits that it has taken and used the sand, silt, and gravel which constitute the submerged portions of the island in the construction of the Smithland project. It is undisputed that defendant has not sought to condemn these underwater acres or paid plaintiffs for their use.

"Plaintiffs contend that the defendant's use of sand, silt, and gravel from the island in the production of cement for the dam project is outside the navigational servitude of the United States. Thus, it is plaintiff's position that while the Government may move away the island, the Government cannot have it. In addition to the Fifth Amendment argument, plaintiffs claim that the defendant's actions have given rise to an implied contract to provide plaintiffs with the value defendant has received from the collateral uses of the submerged acres.

"There is no dispute that the Ohio River is a navigable waterway subject to the dominant navigational servitude of the United States. All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although title to the shore and submerged soil is in the various states and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal Government by the Constitution.

"Projects undertaken by the Government in aid of navigation are to be viewed in their entirety; even if the Government receives some commercial, collateral benefit from the project, such as the use here of sand and gravel for cement, the acts of the United States remain within the power of the navigational servitude and do not amount to a taking of any of plaintiffs' property. *Coastal Petroleum Co.* v. *United States*, 207 Ct. Cl. 701, 524 F. 2d 1206 (1975).

"Accordingly, no compensation from defendant is due plaintiffs. Defendant's motion for summary judgment is granted, and plaintiffs' petition is dismissed."

Plaintiff's petition for a writ of certiorari was denied March 21, 1977.

No. 136-76. SEPTEMBER 10, 1976

William Spooner

Court of Claims jurisdiction; nonappropriated fund instrumentality; privity of contract.—On September 10, 1976 the court entered the following order:

Gerald Kadish, attorney of record, for plaintiff.

Thomas W. Petersen, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before COWEN, *Chief Judge*, DAVIS and BENNETT, *Judges*.

"This case comes before the court on defendant's motion, filed June 28, 1976, in which the Government requests an order dismissing the petition and also asks for summary judgment.

"The Government raises the defense that the petition's request for back pay and reinstatement fails to state a claim within the court's jurisdiction or, alternatively, fails to state a claim upon which relief may be granted. The pertinent portion of plaintiff's petition merely states that he was an alien employee of the Army and Air Force Exchange Service in the Panama Canal Zone and was separated from his position for alleged unauthorized purchase of AAFES gasoline for personal use. Since such position might be held either by appointment or by contract, and since this court has no jurisdiction over claims for back pay by appointees of nonappropriated fund activities, were petitioner an appointee his cause would fail for lack of jurisdiction. *See United States* v. *Hopkins*, 427 U.S. 123 (1976).

"To base his claim on contract plaintiff must properly allege that he was in privity with the Government, and that the latter was bound by an authorized agent acting within his representative capacity to bind the Government. *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947); *Operational Manuals, Inc.* v. *United States*, 205 Ct. Cl. 854 (1974); *Putnam Mills Corp.* v. *United States*, 202 Ct. Cl. 1, 479 F. 2d 1334 (1973). Plaintiff has not averred facts on which the

court's jurisdiction depends, as required by Rule 35(a) nor cited the statutory authority upon which relief may be granted by this court. Rule 35(c). Finally, plaintiff has not responded to the pending motion and is in default thereto. Rule 52(b)(1). Upon consideration of the foregoing and upon authority of the cases cited above,

"IT IS ORDERED that defendant's motion to dismiss and for summary judgment be and it is granted. The petition is dismissed."

No. 237-76. SEPTEMBER 10, 1976

K. Vernon Zeissig

Claim against the United States.—On September 10, 1976 the court entered the following order:

K. Vernon Zeissig, pro se.

Peter A. T. Sartin, with whom was *Assistant Attorney General Rex E. Lee,* for defendant.

Before COWEN, *Chief Judge,* DAVIS, and BENNETT, *Judges.*

"This *pro se* case comes before the court on defendant's motion to dismiss the petition and has been considered, without oral argument, on the petition and exhibits, plaintiff's 'Points of Authority', as well as his documents filed August 23, 1976, and the defendant's motion to dismiss.

"The 'claim' stated by the petition has two aspects. The first is that plaintiff, as a 'citizen,' has an 'absolute right' to his 'fair share' of the 'per capita public and lawful money' 'created by Congress' ('to be computed in accordance with official statistics'). As a citizen, plaintiff obviously has no such automatic right to obtain such a sum from the federal treasury, and the motion to dismiss is well-taken. The second aspect of the 'claim' either seeks an injunction against issuance of Federal Reserve notes (alleged to be unlawful currency) or sets up a tort claim for damages to plaintiff for improperly allowing such notes to circulate. In either case, this court is without jurisdiction.*

*Nor would the District Courts have jurisdiction of this suit against the United States under the Tucker Act, 28 U.S.C. § 1346(a)(2), or the Tort Claims Act, 28 U.S.C. § 1346(b). Section 1506 ('Transfer to Cure Defect of Jurisdiction') of Title 28 is therefore inapplicable.

"IT IS THEREFORE ORDERED that defendant's motion to dismiss is granted and the petition is dismissed."

No. 114–74. SEPTEMBER 30, 1976

Baltimore Contractors, Inc. for the use and benefit of Johnson Drilling Company, Inc.

Contracts; changes; subcontractor's interpretation; value engineering change proposal; rock excavation; remand to board.—Plaintiff, on behalf on its caisson subcontractor, seeks Wunderlich Act review of a decision of the Armed Services Board of Contract Appeals (reported at 74–1 BCA para. 10442) denying plaintiff an equitable adjustment in contract price claimed for alleged additional rock excavation work required by the Government. The contract was a fixed-price, competitively bid contract for construction of the second phase of a medical biological research laboratory at Fort Detrick, Maryland. The claim presented to the Board (which it rejected on several grounds) rested on the contention that in requiring the contractor to excavate beyond the point of bearing rock defendant had not only departed from what the contractor had proposed but had imposed a unilateral enlargement in contract requirements for which the contractor was entitled to additional compensation. On September 30, 1976 Trial Judge John P. Wiese filed a recommended opinion (reported in full at 21 CCF para. 84250) concluding that the Board's decision should be reversed. On September 30, 1976 the court entered the following order:

Thomas E. Abernathy, IV, attorney of record, for plaintiff. *Harry L. Griffin, Jr.*, *Luther P. Cochrane*, and *Smith, Currie & Hancock*, of counsel.

Michael J. Rubin, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before COWEN, *Chief Judge*, DURFEE, *Senior Judge*, and SKELTON, *Judge*.

"This case comes before the court on Defendant's Request for Review of the recommended decision of Trial John P. Wiese, pursuant to Rule 166(c).

"Upon consideration of the motions and briefs of the parties, the court agrees with the trial judge's recommended decision (copies of which have been furnished to the parties), except for the modification stated below.

"As modified, his recommended decision is adopted by the court as the basis for its decision. Accordingly, the decision of the Armed Services Board of Contract Appeals is reversed; the government is not entitled to a price credit from the contractor as determined by the Board and the contractor is entitled to an equitable adjustment in accordance with this decision. Therefore, judgment is entered for the plaintiff and the case is remanded to the Board, under Rule 149, for proceedings to determine the quantum of the equitable adjustment to which the plaintiff is entitled. Further proceedings in this court are stayed for 6 months. Counsel for plaintiff is designated to advise the court of the status of proceedings as required by Rule 149(f).

"Those portions of the trial judge's recommended decision entitled 'Future Proceedings' and 'Conclusion' are deleted and the following is substituted therefor:

"On the basis of facts which have been stipulated by the parties or are undisputed, the court makes the following additional findings of fact which are to be used as a basis for the Board's determination of the quantum of recovery:

"1. *Background Data:* The total rock excavation (overburden excluded) indicated on the caisson data sheets was, as stipulated, 2,482.5 lineal feet. This figure represents the sum of the differences between the 'top of rock' elevations and the 'bottom of caisson' elevations that were given for each of the caissons. In turn, this figure for total rock has two components: from top of rock to the elevation at which the socket rock begins, there were 1,379.5 lineal feet of excavation and from top of socket elevation to the bottom of the caisson, the excavation amounted to 1,103.0 lineal feet. These figures reflect the additional excavation that the eight double caissons required.

"2. *The Subcontractor's Bid:* Johnson's bid was premised upon the excavation of 1,402 lineal feet of rock, *i.e.*, the bid assumed excavation to the point of firm rocks (1,379.5 lineal

feet per 1 above) plus socketing to some minor extent (22.5 lineal feet).

"3. *The Quantity Excavated:* The parties stipulated that the total amount of rock excavation actually performed in this case was 1,929 lineal feet. This means that all rock above the point of firm rock was removed (1,379.5 lineal feet per 1 above) plus 549.5 lineal feet of firm rock or socket rock. These same figures, assessed against Johnson's bid, establish that the subcontractor was required to excavate 527 lineal feet more than it had anticipated.

"For its determination of the amount of the equitable adjustment due plaintiff, the Board is directed as follows: Although the subcontractor Johnson was required to excavate 527 lineal feet more than it anticipated in its bid, the 527 lineal feet do not constitute the excess excavation for which the contractor is entitled to an equitable adjustment. Under the provisions of the contract as interpretated by the court and as shown by the parties' exhibits, the load requirements for certain of the caissons (given an assumed bearing value of 50 TSF) were such that some socketing was necessary in order to provide the requisite support. The 527 lineal feet of socketing in excess of the footage calculated by the subcontractor in its bid should be reduced by the amount of excavation needed for those particular caissons. The quantity that remains after this reduction represents the excess excavation for which the contractor is entitled to an equitable adjustment.

"The Board's decision shows that during the time the subcontractor, Johnson, used core barrels (*i.e.*, the equipment that was used before the introduction of the magnum drill rig), the progress of the work was not in accordance with the schedule that the subcontractor had planned to achieve. To the extent that such schedule slippage was due to the subcontractor's failure to use adequate equipment or other causes than the excessive excavation which the government was then requiring, such other causes should be taken into account by the Board in determining the additional performance time and costs for which the government is responsible. Since the subcontractor's 'booked' costs may mask ineffi-

ciencies attributable to its initial use of core barrels, the Board should hear and consider other evidence of the reasonable cost of performing the extra excavation with the use of a magnum drill."

No. 38-75. SEPTEMBER 30, 1976

Aloysius A. J. Flute

Military pay; ex parte receipt and consideration by correction board of advisory opinion of Air Force Judge Advocate General.—On September 30, 1976 the court entered the following order on plaintiff's suggestion for rehearing *en banc* and motion for rehearing respecting the decision and opinion of the court of May 12, 1976, 210 Ct. Cl. 34, 535 F.2d 624, and on the motions of the District of Columbia Bar Association.

Richard P. Fox, attorney of record, for plaintiff, *Max Gest*, of counsel.

Stephen G. Anderson, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before DAVIS, *Judge*, Presiding, NICHOLS and BENNETT, *Judges*.

"This case comes before the court on plaintiff's suggestion for rehearing en banc and plaintiff's motion for rehearing. There is also before the court the motions of the Bar Association of the District of Columbia for leave to file a brief amicus curiae in support of plaintiff's petition for rehearing, for an extension of time within which to file such a brief, for waiver of the page limitation provision, and for leave to present oral argument. The active judges of the court having denied the suggestion that these matters be considered en banc, the various motions, and the responses thereto, have been considered by the above panel.

"The motion for rehearing is denied. With respect to the ex parte receipt and consideration by the Air Force Board for the Correction of Military Records of an advisory opinion of the Air Force Judge Advocate General—the special

point in which the Bar Association is interested— the court points out that (a) the decision of May 12, 1976, dismissing the petition, rested essentially on the ground that, regardless of any defects in the procedure of the BCMR, plaintiff had shown no constitutional or jurisdictional defect in his court-martial conviction and therefore this court could not grant him any relief; (b) the discussion of the ex parte consideration by the BCMR of the JAG opinion could therefore be considered moot since the result in this court (particularly under *United States* v. *Testan*, 424 U.S. 392 (1976)) would not be changed even if that discussion was excised, modified, or overturned; and (c) in any event the opinion's discussion of the receipt of ex parte material was limited to instances in which a correction board was considering whether to hold a hearing. In these circumstances the court deems that reconsideration of the decision and opinion of May 12, 1976 is unnecessary and inappropriate in this case even if there be thought to be doubt as to the correctness of the opinion's statements on receipt of ex parte materials in correction board decisions made without a hearing.

"For the same reasons the court considers the Bar Association's participation, at this stage, in this particular case to be unnecessary and inappropriate, and therefore denies the Association's motions.

"IT IS SO ORDERED."

No. 79–75. SEPTEMBER 30, 1976

Jack Sanders Corporation

Contracts; disputes; equitable adjustment; Variation in Estimated Quantities Clause; discount for prompt payment; remand to Contract Appeals Board.—On September 30, 1976 the court entered the following order:

Sam O. Buckley, attorney of record, for plaintiff. *Keiler & Buckley*, of counsel.

Gerald Schrader, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before COWAN, *Chief Judge*, DURFEE, *Senior Judge*, and SKELTON, *Judge*.

"This case comes before the court on Defendant's Motion for an Order Amending the court's order of June 25, 1976 and Plaintiff's Motion for Rehearing. The motions of both parties state that in their briefs and argument to the court, they failed to properly explain or clarify the effect of the decision of the Corps of Engineers Board of Contract Appeals and consequently, that no final judgment can be entered in conformity with the court's order.

"Upon consideration of the parties' motions, the court finds that:

"1. On the three contracts the total contract price which the contracting officer allowed and paid to plaintiff was the sum of $1,017,074.01, less a discount of $50,853.71 withheld by the contracting officer because of prompt payment by the government, or a total net payment of $966,220.30.

"2. In support of its counterclaim in the hearing before the Board, the government contended as follows:

> Should the Board determine the Appellant to be entitled to an increase in contract price, under any of the concerned contracts, then the United States believes that it would upon payment of such monies within the discount period be entitled to a 5% prompt payment discount. On the other hand, should the Board reach an equitable adjustment decreasing contract prices, the United States would expect to allow Appellant a credit equal to the prompt payment discount and recover only 95% of the determined reduction.

"3. In the hearing before the court and in its Motion to Amend the Order of June 25, 1976, the government took an entirely different position regarding the claimed cash discount. Before the court the government contends that if the Board's determination of the adjusted contract prices is adopted, the amounts found by the Board should be further reduced by a discount of 5 percent. Even if it should be decided that the contractual provision covering cash discounts is applicable to the adjusted contract prices, the court finds that this contention is erroneous and rejects it, because it fails to credit the contractor with the previously deducted discount and would impose the discount for prompt payment

twice: once upon the original payments made by the contracting officer, and again upon the basis of the Board's decision.

"4. The plaintiff admits that it has been paid the contract price as stated in paragraph 1 above, but has not admitted that the government is entitled to any discount on the 'total contract earnings' as determined by the Board.

"5. There is no indication in the Board's decision that it made any determination as to the applicability of the cash discount provision of the contracts to the adjusted contract prices found by the Board.

"On the basis of the foregoing, it is hereby

"ORDERED that the court's order and judgment of June 25, 1976 is hereby amended in its entirety to read as follows:

"This case comes before the court on the parties' cross motions for summary judgment under Rule 163(b)(2) in a case involving a review under the Wunderlich Act of a decision rendered by the Corps of Engineers Board of Contract Appeals. Plaintiff was awarded three contracts for removal and disposal of debris caused by hurricane 'Celia,' which struck the Gulf Coast in 1970. The actual quantities of debris removed by plaintiff substantially exceeded the quantities estimated in the contracts. The sole issue is the amount of the equitable adjustment to which plaintiff and defendant are entitled for removal of the excess, and the answer requires only an interpretation of the 'Variations in Quantities' clause of the contracts. Thus, the case involves a question of law with no factual disputes.

"Upon consideration of the motions and briefs of the parties and after hearing oral argument, the court finds that the decision of the Board as to the contractor's earnings on the adjustable units under the three contracts is supported by substantial evidence and is correct as a matter of law.

"IT IS THEREFORE ORDERED that the decision of the Board is affirmed and the case is remanded to the Corps of Engineers Board of Contract Appeals which is instructed to determine:

"1. Whether the cash discount provision of the contract has any application to the adjusted contract price of the three contracts, and if so, how it is to be applied to each contract.

"2. The amount of the equitable adjustment to which the government is entitled under the Board's decision on the San Patricio and Rockport contracts.

"3. The amount of the equitable adjustment to which plaintiff is entitled under the Board's decision on the Portland contract.

"4. The net amount which the government is entitled to recover on its counterclaim.

"Pursuant to Rule 149, court proceedings shall be stayed for a period not to exceed 6 months in order to enable the Board to make the determinations stated above. Defendant's attorney is designated to advise the court, by letter to the trial judge, with a copy to opposing counsel, of the status of the proceedings on remand at intervals of 90 days or less.

"IT IS FURTHER ORDERED that except as stated above, the Defendant's Motion to Alter or Amend the Judgment of June 25, 1976 and Plaintiff's Motion for Rehearing are each hereby denied."

On May 2, 1977 plaintiff's petition for certiorari was denied.

No. 136–75. SEPTEMBER 30, 1976

Daniel S. Carlin

Military pay; correction of military records; discretion of Air Force Secretary; nonselection for promotion.—On September 30, 1976 the court entered the following order:

Maurice F. Biddle, attorney of record, for plaintiff. *Thomas H. King*, of counsel.

Donnie Hoover, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before NICHOLS, *Judge*, Presiding, KASHIWA and KUNZIG, *Judges*.

"This case comes before the court on defendant's motion for summary judgment, filed November 10, 1975. There is no genuine issue as to any material fact.

"Plaintiff, Daniel S. Carlin, a twice deferred officer, is suing to have his military record changed to reflect promotion

to temporary and permanent major as well as for the difference in pay between captain and major from the date he allegedly would have been promoted to the date of judgment. Plaintiff alleges that the failure of the Air Force Board for the Correction of Military Records (AFBCMR) and the Secretary of the Air Force's designee, the Acting Assistant Secretary for Manpower and Reserve Affairs (Assistant Secretary), to promote him to temporary and permanent major and the removal from his record of only one non-selection to permanent major were arbitrary and capricious.

"The statutory authority creating boards for the correction of military records is 10 U.S.C. § 1552 (1970). It is clear from the statute as well as the cases decided thereunder that the Secretary's decision to correct any military record is a discretionary one. See *Boyd* v. *United States*, 207 Ct. Cl. 1 (1975), *cert. denied*, 424 U.S. 911 (1976). The authority of the Secretary to approve or disapprove AFBCMR recommendations is delegated to the Assistant Secretary pursuant to 10 U.S.C. § 8012(c) (1970) and Air Force Order 100.1 (1972).

"Plaintiff questions the authority of the Acting Assistant Secretary to act contending that 5 U.S.C. § 3348 (1970) limited his detail as Acting Assistant Secretary to 30 days and his action occurred after that period. Defendant states that the 30-day limitation does not apply because the Acting Assistant Secretary was detailed by the Secretary of the Air Force pursuant to 10 U.S.C. § 8012(e) (1970), which does not contain a time limitation. Based on 19 Op. Att'y Gen. 503 (1890) and 28 Op. Att'y Gen. 95 (1909), it is our conclusion that since the Assistant Secretary is not one whose appointment was specifically provided for by statute, the Acting Assistant Secretary was not authorized to perform the duties of his superior under 5 U.S.C. § 3346 (1970). Therefore, § 3348 does not affect the case.

"This court has recognized that the Secretary may overrule findings of the Board when they are not justified by the record upon which they are made. See *Proper* v. *United States*, 139 Ct. Cl. 511, 154 F. Supp. 317 (1957), and *Boyd* v. *United States*, *supra*. In voiding plaintiff's challenged OER's and removing from his record two passovers for selection to

temporary major and one for selection to permanent major, the AFBCMR and the Secretary have provided plaintiff with all the relief warranted by his record. Absent a clear showing by the plaintiff that the Secretary's action was arbitrary or capricious, the Secretary's decision will not be reversed by this court.

"As far as plaintiff's allegations that the decision by the AFBCMR not to promote him was arbitrary and capricious are concerned, for the same reasons that the decision of the Secretary was not arbitrary and capricious, we conclude that the decision of the AFBCMR was not arbitrary and capricious. We also note that, as in the case of the Secretary's decision, absent an allegation and *proof* of arbitrary action, the plaintiff is bound by an approved decision of the AFBCMR. See *Bowman* v. *United States*, 142 Ct. Cl. 367 (1958); *Nealon* v. *United States*, 175 Ct. Cl. 894, *cert. denied*, 385 U.S. 973 (1966); and *Unterberg* v. *United States*, 188 Ct. Cl. 994, 412 F. 2d 1341 (1969).

"In any event, inasmuch as plaintiff requests promotion, he must be denied the relief he seeks since this court and other federal courts have frequently held that they will not promote military officers. See *Brenner* v. *United States*, 202 Ct. Cl. 678 (1973), *cert. denied*, 419 U.S. 831 (1974); *Norman* v. *United States*, 183 Ct. Cl. 41, 392 F. 2d 255 (1968), *cert. denied*, 393 U.S. 1018 (1969); *Reaves* v. *Ainsworth*, 219 U.S. 296 (1911); *Orloff* v. *Willoughby*, 345 U.S. 83 (1953); *Arnheiter* v. *Chafee*, 435 F. 2d 691 (9th Cir. 1970).

"With regard to plaintiff's assertions that the action of the AFBCMR in removing only one passover to permanent major constitutes proof of arbitrary and capricious conduct, 10 U.S.C. § 1552 (1970) permits the Secretary to correct a military record when he considers it necessary to correct an error or remove an injustice. Neither the statute nor the implementing regulation, Air Force Regulation 31–3 (1970), requires a wholesale restructuring of an applicant's records to achieve the removal of an injustice, but, rather, the statute permits an *adequate* correction to ensure that the injustice is removed. In this case, the AFBCMR determined that the injustice wrought by the OER's it removed could be rectified

by enabling the plaintiff to compete for selection without the damaging OER's *on one more occasion.*

"As far as plaintiff's reliance on *Yee* v. *United States*, 206 Ct. Cl. 388, 512 F. 2d 1383 (1975), is concerned, no compelling circumstances exist in the instant case which warrant plaintiff's promotion. Moreover, this case is distinguishable from *Yee* in several respects. First of all, the OER's that were subsequently removed from plaintiff's file covered periods between 1962 and 1965. Plaintiff received additional OER's between that time and the time that he resigned. Also, appropriate forms were placed in plaintiff's file (AF 77–A's) to show that the OER's had been removed by Board action. As far as the absence of OER's during the period 1971 to 1974 is concerned, plaintiff was serving as an enlisted man, thus he could not have received any OER's as an officer. Thus, since there was an adequate explanation for the voids in plaintiff's record, the court's decision in *Yee*, *supra*, is not applicable to the instant case. For the above reasons,

"IT IS ORDERED that defendant's motion for summary judgment is granted and the petition is dismissed."

Plaintiff's motion for rehearing was denied January 5, 1977.

No. 304–75. SEPTEMBER 30, 1976

The City of Pawtucket

Water Quality Improvement Act; oil-spill clean-up costs.—On September 30, 1976 the court entered the following order:

Moses Kando, City Solicitor, Pawtucket, Rhode Island, for plaintiff.

Raymond W. Mushal, with whom was *Assistant Attorney General Peter R. Taft*, for defendant.

Before DAVIS, *Judge*, Presiding, KUNZIG and BENNETT, *Judges.*

"The City of Pawtucket (City) seeks reimbursement for clean-up expenses it incurred combatting an oil spill from two city-owned storage tanks. The City relies on Section 11

(i)(1) of the Water Quality Improvement Act of 1970, 33 U.S.C. § 1321(i)(1) (1970) (Supp. V, 1975), which states:

> Recovery of removal costs
> (i)(1) In any case where an *owner* or operator *of* a vessel or *an onshore facility* or an offshore facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section acts to remove such oil or substance in accordance with regulations promulgated pursuant to this section, such owner or operator *shall be entitled to recover the reasonable costs incurred in such removal upon establishing*, in a suit which may be brought against the United States Government in the United States Court of Claims, *that such discharge was caused solely by* (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) *an act or omission of a third party without regard to whether such act or omission was or was not negligent*, or of any combination of the foregoing causes. [emphasis added]

The City maintains that a vandal (a third party by the terms of part D of the above statute) was the sole cause of an October 6, 1974 oil spill. However, upon consideration of the defendant's motion for summary judgment, the briefs and exhibits filed with the court, we hold the City is not entitled to recover.

"The City acquired the storage tanks in January 1974, when it purchased the land on which they are located. No plans were made for the use of the oil in the tanks; in fact, plans were discussed concerning destruction of the tanks themselves. Attempts to sell the oil failed when it proved to be 'stale' and unmerchantable. At the time the City took possession, security facilities were in a state of disrepair. Surrounding fences were incomplete and featured gaping holes through which even City employees gained access to the tanks. Floodlights illuminating the tank area had burned out. The lock on the gate did not have a key. The tanks' spigots were unlocked. Drainage facilities to protect against accidental spillage were in disrepair. No action was taken with regard to the security facilities during the eight months of City ownership which preceded the oil spill.

"The focal point of this litigation is the definition of the word 'solely' contained in subsection (i)(1) of 33 U.S.C.

§ 1321, *supra*. The City's position is that the spill was solely caused by a vandal. The Government says the City's omissions constitute a cause of the spill; therefore, the vandal was not the sole cause. As the vandal was not the sole cause, the Government continues, the City is not entitled to recover.

"The Government is clearly correct. Title 33 U.S.C. § 1321 (i)(1) requires plaintiff to prove that the discharge was caused solely [1] by an act or omission of a third party. *Tanker Hygrade No. 18, Inc.* v. *United States*, 208 Ct.Cl. 488, 492–3, 526 F.2d 805, 807 (1975), *cert denied*, 426 U.S. 920 (1976). This the City has failed to do. In fact, the Government's exhibits, including pictures, affidavits, depositions and interrogatories indicate that the oil spill was primarily caused by the omissions of the City.

"While this case does not present facts as strong for the Government as *Tanker Hygrade No. 18, Inc.*, *supra*, it is clearly controlled by it. In that case, involving an oil spill resulting from a collision, the 'third party' which struck plaintiff's barge was a wholly-owned subsidiary of the company which also owned the plaintiff, Hygrade No. 18. The court, applying collateral estoppel from an earlier case,[2] held that the accident was not caused solely by the acts of a third party. The common ownership of the corporations involved prevented plaintiff from recovering.

"Here the third party is unknown. But it was the omissions of plaintiff which gave the third party easy access to the tank area and created a situation conducive to vandalism. The evidence shows gaping holes in the protective fence, no lighting in the tank area, lack of a working lock on the gate (City personnel desiring access were forced to crawl under the fence), unprotected oil tank spigots, improper drainage spouts for possible overflow oil, and a variety of almost 'Keystone Kop' antics of local guards and officials. All of the above lead to the conclusion that the City was

[1] As 'solely' is not defined in the Act, its common definition is assumed: 'without an associate; singly; alone.' Webster's Third New International Dictionary (1971).

[2] *United States* v. *Ira S. Bushey & Sons, Inc.*, 363 F. Supp. 110 (D. Vt.), *aff'd*, 487 F.2d 1393 (2d Cir. 1973), *cert. denied*, 417 U.S. 976 (1974).

definitely a major contributing cause to the oil spill.[3] In view of this, it cannot be said that a vandal was the sole cause of the spill within the meaning of 33 U.S.C. § 1321 (i)(1), *supra. Tanker Hygrade No. 18, Inc., supra.*

"Unlike *Shell Pipe Line Corp.* v. *United States*, Ct. Cl. No. 108-75 (Order entered April 16, 1976), which involved an oil spill from a ruptured pipe line, we do not need to remand this case for finding of fact. There the crucial issue of ground subsidence was contested. Here examination of the papers filed shows agreement as to the material facts. The failure here of either party to show a genuine issue as to a material fact allows us to render a decision as to the merits. Rule 101(d); *see Housing Corp. of America* v. *United States*, 199 Ct. Cl. 705, 710, 460 F.2d 922, 924 (1972).

"Accordingly, having viewed the photographs supplied, having studied the affidavits and discovery materials of the parties, and upon the authority of 33 U.S.C. § 1321, *supra*, and *Tanker Hygrade No. 18, Inc., supra*, IT IS HEREBY ORDERED THAT defendant's motion for summary judgment is granted and the petition is dismissed."

No. 448-75. SEPTEMBER 30, 1976

Robert E. Burket

Court of Claims jurisdiction; tort claim.—On September 30, 1976 the court entered the following order:

Before DAVIS, *Judge*, Presiding, KUNZIG and BENNETT, *Judges.*

"This case comes before the court on defendant's motion to dismiss plaintiff's claims and plaintiff's response thereto. Plaintiff has filed two petitions which are joined under a single docket number. He has moved to amend his plead-

[3] As well, note that 40 CFR § 1126 (1975) provides civil penalties for failure to maintain the required preparedness plan. The failure of the City to maintain the required plan, especially where, as here, the injury (the spill) is the one which the regulation is designed to protect against, could be considered negligence *per se. Freeman* v. *United States*, 509 F.2d 626, 630 (6th Cir. 1975). This failure alone by the City could perhaps be sufficient to bar its recovery from the Government. Because of the additional facts present in this case, however, the court need not base its decision on this point.

ings. We allow him to do so and consider his claims as amended.

"Plaintiff, proceeding pro se, alleges that he is a war veteran of scientific and administrative talents whose name was arbitrarily removed by the Civil Service Commission in 1972 from listings of qualified eligibles for government employment. He claims damages of $500,000 based on the first, fourth, fifth and sixth amendments to the Constitution because of defendant's action which he alleges is predicated on his alleged mental instability and which charge is discriminatory, vindictive and malicious, and denied him due process. His claim for money damages is for lost employment, lost health, lost privacy, lost reputation, lost time, mental anguish, forced poverty, lost prestige, loss of respect and lost chances to maintain his advanced knowledge as a metallurgist and physicist. In a companion action based on the fifth and ninth amendments he seeks $1 million for substantially the same reasons, but including his 'space industry contribution' represented by unidentified patents. Plaintiff further represents that he exists on veteran's compensation which totals $478 per month. He has been permitted by the court to sue as a poor person on his affidavit of poverty. Defendant concedes that plaintiff has a VA rating of 100 percent total and permanent disability.

"The thrust of the motion to dismiss is that plaintiff seeks relief which the court does not have jurisdiction to grant. Defendant is plainly correct. The claims before us sound in tort and tort jurisdiction is denied to us by Congress under the Tucker Act, 28 U.S.C. § 1491 (1970). See the order in *Myers* v. *United States*, 206 Ct. Cl. 863 (1975), which collects relevant authorities going back to 1866. Most recently the Tucker Act's limitations were discussed by the Supreme Court in *United States* v. *Testan*, 424 U.S. 392 (1976), which cites and approves, among others, the discussion of the jurisdiction of this court in *Eastport S.S. Corp.* v. *United States*, 178 Ct. Cl. 599, 372 F. 2d 1002 (1967).

"IT IS THEREFORE ORDERED, upon consideration of plaintiff's petitions as amended and joined, plaintiff's affidavit, memorandum of law and exhibits, defendant's responses thereto

and its motion to dismiss, without oral argument, that defendant's motion to dismiss is granted and plaintiff's petitions are hereby dismissed."

No. 28–76 SEPTEMBER 30, 1976

Kevin E. Villani

Civilian pay; Court of Claims jurisdiction; nonappropriated funds activity; injunctive or declaratory relief.—

Alan I. Goodman, for plaintiff.

James F. Merow, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before DAVIS, *Judge*, Presiding, KUNZIG and BENNETT, Judges.

"In this civilian pay case, plaintiff Kevin E. Villani comes before the court seeking back pay and both a declaratory judgment and an injunction against the Federal Reserve Bank of Cleveland, Ohio. The gravamen of plaintiff's complaint is that he was wrongfully terminated from his position as a research economist on July 1, 1975, and is, therefore, entitled to back pay from that date until September 1, 1975. The amount in controversy is $2,700.

"Defendant seeks a dismissal of the action, alleging that this court lacks subject matter jurisdiction. Defendant relies upon the Supreme Court's holding in *United States* v. *King*, 395 U.S. 1 (1969), and *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 557 (1962). *King*, *supra*, denies the Court of Claims power to grant declaratory relief, while *Zdanok*, *supra*, denies the court injunctive powers. Concerning plaintiff's claim for back pay, defendant notes that salary payments for employees of the Federal Reserve Bank do not involve appropriated funds of the United States. Unless salary payments involve appropriated funds or, if non-appropriated funds, an entity named in 28 U.S.C. § 1491 (as amended by Pub. L. 91–350 (1970)), this court lacks jurisdiction. Defendant properly makes this argument citing our recent decision in *Hopkins* v. *United States*, 206 Ct. Cl. 303, 513 F.2d

1360 (1975). The briefs in this case pre-date the Supreme Court's consideration of *Hopkins*. *United States* v. *Hopkins*, 427 U.S. 123 (1976).

"Plaintiff suggests that we do have jurisdiction in this non-appropriated fund case, but does not cite authority for this proposition. Plaintiff further attempts to show that the receipt of benefits by the Government from Federal Reserve System contracts somehow transforms the government into the 'principal' on said contracts, creating government liability.

"Upon consideration of the briefs and without oral argument, we grant defendant's motion to dismiss the petition. Defendant is clearly correct. First, we lack jurisdiction to provide the declaratory and injunctive relief sought by plaintiff. *King*, *supra; Glidden Co.*, *supra*. Second, since the salary in question was due from a non-appropriated fund, plaintiff must show the existence of a statutory "non-appropriated fund obligation" of the United States based on a contractual relationship with an entity named in 28 U.S.C. § 1491 (as amended by Pub. L. 91–350 (1970)). Plaintiff has failed to do so. Third, plaintiff's 'principal on a contract' doctrine argument is misplaced and must fail.

"Villani frankly admits that the court lacks jurisdiction over this non-appropriated fund activity. However, he seemed to envision, at the time briefs were filed, a broad Supreme Court reversal of this court's decision in *Hopkins*. Such reversal, he believed, would grant to the Court of Claims jurisdiction over non-appropriated fund activities. Plainly, the Supreme Court did not reach such a sweeping decision. *United States* v. *Hopkins*, 427 U.S. 123 (1976). We therefore dismiss this argument.

"In plaintiff's final argument he cites four cases which he alleges stand for the 'principal on a contract' doctrine—the proposition that the United States may not escape liability by contracting through the guise of a private corporation. *National Cored Forgings Co.* v. *United States*, 132 Ct. Cl. 11, 132 F. Supp. 454 (1955); *Abbott* v. *United States*, 125 Ct. Cl. 330, 112 F. Supp. 801 (1953); *Crooks Terminal Warehouses, Inc.* v. *United States*, 92 Ct. Cl. 401 (1941); and *John Morrell & Company* v. *United States*, 89 Ct. Cl. 167 (1939). Since none

of the cases cited deals with non-appropriated fund activities, they are unpersuasive and inapposite.

"Accordingly, for the reasons stated above, IT IS HEREBY ORDERED THAT defendant's motion for summary judgment is granted, and the petition is dismissed."

No. 210–76. SEPTEMBER 30, 1976

Alfred Martorelli

Court of Claims jurisdiction; tort claim; injunctive or declaratory relief.—On September 30, 1976 the court entered the following order:

Before DAVIS, *Judge*, Presiding, KUNZIG and BENNETT, *Judges*.

"Plaintiff's petition was filed May 28, 1976, pursuant to an order of the Chief Judge permitting the filing without payment of the filing fee, waiving printing requirements, and deferring defendant's answer until consideration by the court of the adequacy of the petition.

"Plaintiff recites a series of episodes beginning in September 1949 and continuing to August 1975, alleging numerous contacts with the Department of Defense, the Air Force, the FBI, the Chief of Naval Operations and the President, all directed toward his concepts of national defense on land, sea, and in the air, and his difficulties with enemy agents. He alleges, among other things, to be the originator of the cruise missile weapons system. The thrust of the petition seems to be that plaintiff's efforts have not been fully appreciated by the said authorities who have given him the 'silent treatment' and all of whom are charged by him with conspiracy, theft, and deception in misleading the American people and the Congress as to plaintiff's weapons systems. Plaintiff's plea for relief alleges a claim for money damages in the amount of $22 million and seeks what apparently would be an injunction against the national leaders putting a halt to the production of first strike weapons, which have allegedly been obtained from plaintiff's inventions. Plaintiff additionally describes his difficulties with the Postal Service and the Internal Revenue Service.

"It is apparent from the face of the petition that it is fatally deficient in that it does not comply with the pertinent provisions of Rule 35, for it does not cite the Act of Congress, regulation, or contract upon which the claim is founded. Defendant, therefore, is excused from filing an answer. Further, the petition does not allege a claim for which this court is empowered to grant relief. The wrongs, if any, alleged by plaintiff are tortious in nature and not within our jurisdiction. 28 U.S.C. § 1491 (1970). Also, plaintiff seeks an order stopping production of weapons. This court has no power to grant injunctive relief or to render declaratory judgments. *United States* v. *Testan*, 424 U.S. 392 (1976); *United States* v. *King*, 395 U.S. 1 (1969); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 557 (1962).

"IT IS THEREFORE ORDERED that upon consideration of the petition and upon its own motion, without briefs or oral argument, the said petition is dismissed."

No. 507-69. OCTOBER 1, 1976

Melvin Allison, et al.

Court of Claims jurisdiction; injunctive or declaratory relief; racial discrimination claim.—On October 1, 1976 the court entered the following order. This case has been before the court previously, *see* 196 Ct. Cl. 263, 451 F. 2d 1035 (1971).

Paul J. Tagliabue, attorney of record for plaintiff. *Covington & Burling; Ralph J. Temple*, of counsel.

LeRoy Southmayd, Jr., with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, *Judges*.

This case comes before the court on defendant's motion to dismiss plaintiffs' motion for an order directing H.E.W. to proceed with this case on remand, plaintiffs' motion for leave to file its first amended petition and plaintiffs' suggestion for an *en banc* hearing. Upon consideration thereof, the court concludes that in view of the decisions of the Supreme Court in *United States* v. *Testan*, 424 U.S. 392 (1976), and *Brown*

v. *General Services Admin.*, 425 U.S. 820 (1976), it has no jurisdiction of this action, but that the case should be transferred to an appropriate district court pursuant to the Equal Employment Opportunity Act of 1972 and 28 U.S.C. § 1506.

"IT IS THEREFORE ORDERED that this case is hereby transferred to the United States District Court for the District of Columbia; and

"IT IS FURTHER ORDERED that plaintiffs' motion for leave to file their first amended petition and their motion (filed April 22, 1975) for an order remanding this case to the Department of Health, Education and Welfare, are denied without prejudice, and their suggestion for oral argument *en banc* is also denied.

No. 598–71. OCTOBER 1, 1976

Mancon Liquidating Corp.

Renegotiation of contract.— On October 1, 1976 the court entered the following order in the above-identified case. This case has been before the court previously, *see* order entered March 21, 1975 reported at 206 Ct. Cl. 881, and the order of June 11, 1976 reported at 210 Ct. Cl. 695 which the present order vacates.

Dean Carlton, attorney of record, for plaintiff.

Paul T. Michael, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before DAVIS, *Judge*, Presiding, NICHOLS and KUNZIG, *Judges*.

"This renegotiation case comes again before the court on defendant's motion to vacate our order of June 11, 1976, or alternatively, for a rehearing *en banc*. Defendant asks us to dismiss the case with prejudice, or enter an order directing the trial judge to hold a hearing to determine whether plaintiff's non-compliance with the pretrial accounting order was wilful. The active judges of the court having denied the suggestion for reconsideration *en banc*, the defendant's motion has been considered by the above panel which issued the order of June 11, 1976. That order denied defendant's motion to

dismiss and granted a stay of defendant's obligations under the pretrial order issued by Trial Judge John P. Wiese.

"Having considered defendant's presentation, the panel hereby vacates the order of June 11, 1976. Once again, we decline to dismiss the case; at this stage in the litigation, dismissal is too harsh a remedy. However, the panel is in no way approving plaintiff's failure to take appropriate action to secure the material needed for the pretrial accounting order. In the 120 days given plaintiff to prepare the pretrial statement, no effort was made to subpoena the missing books and records. Nor has plaintiff used any other discovery procedures available to it. This lack of effort is in open disregard of the trial judge's invitation to plaintiff to make 'an appropriate motion to this court' in the event that it encountered 'difficulties * * * with respect to gaining access' to the materials. Letter of Trial Judge Wiese to Dean Carlton, Esq., Counsel for Mancon Liquidating Corp., September 23, 1975.

"The panel agrees with Trial Judge Wiese that this case has already been delayed an unreasonable length of time. Although we decline to require a hearing on the wilfulness of plaintiff's behavior, plaintiff is hereby ordered to employ all available means to comply with the Standard Pretrial Order on Accounting for Renegotiation Cases and to do so within 60 days of the entry of this order. In the event of plaintiff's failure or refusal further to comply, plaintiff is herewith further ordered to show cause within the 60 days why its claim should not be dismissed with prejudice (Rule 102(b)) for non-compliance with the pretrial order and Rule 111(d).

"The stay of defendant's obligations under the pretrial order continues. The burden is on plaintiff to produce the information required for the completion of the accounting forms.

"IT IS SO ORDERED."

No. 450–73. OCTOBER 1, 1976

James McConnen & Sons

Contracts; release; settlement under contract modification; waiver of all claims.—On October 1, 1976 the court entered the following order. For previous actions by the court in the

series of cases filed by James McConnen & Sons, *see* 205 Ct. Cl. 839 (1974); 208 Ct. Cl. 1015, 1016 (1976).

James McConnen, pro se.

Vincent M. Garvey, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before DAVIS, *Judge*, Presiding, KUNZIG AND BENNETT, *Judges*.

"This case comes before the court for review of the recommended decision of Trial Judge Kenneth R. Harkins, filed May 24, 1976 [reported in full at 22 CCF para. 80324], as a result of a document filed by plaintiff on June 28, 1976, and entitled "REPLY TO FINAL ORDER OF TRIAL JUDGE CASE 450–73–May 24/76 & TO IT'S CROSS INCORPORATION IN THE ORDER OF CASES 209–74, 211–74, 210–74 & 304–74."

"Since plaintiff represents himself, we have treated this document as a request for review pursuant to Rule 54(b)(3). Upon consideration of plaintiff's submission and defendant's response thereto, the court agrees with the trial judge's recommended decision and adopts it as the basis for its judgment in this case. Copies of his decision have been furnished to the parties.

"IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment is denied; defendant's cross-motion for summary judgment is granted and plaintiff's petition, as amended, is dismissed.

"Plaintiff has also filed a document designated as his fourth petition for a peremptory writ of prohibition and has included therein requests for relief similar to those which have previously been considered by the court in other cases filed by plaintiff. *See* the court's order in docket Nos. 209–74 and 211–74, issued January 23, 1976 [208 Ct. Cl. 1015]. To the extent that the court has jurisdiction thereof, plaintiff's additional requests for a writ of prohibition and other relief are hereby denied."

Plaintiff's fifth petition for peremptory writ of prohibition was denied January 7, 1977, to extent that the court has jurisdiction thereof.

No. 198–75. OCTOBER 1, 1976 and DECEMBER 28, 1976

Mary M. Sliman

Military pay; separation; review and selection boards; retirement pay.—On October 1, 1976 the court entered the following order:

Thomas H. King, attorney of record, for plaintiff. *John A. Everhard* and *Maurice F. Biddle*, of counsel.

Marc J. Fink, with whom was *Assistant Attorney General Rex. E. Lee*, for defendant.

Before DAVIS, *Judge*, Presiding, NICHOLS and KUNZIG, *Judges*.

"This case comes before the court on plaintiff's motion for reconsideration of the order of June 11, 1976, and for oral argument thereon, and also on plaintiff's suggestion for reconsideration en banc. The active judges of the court having denied the suggestion for reconsideration en banc, the plaintiff's motions have been considered by the above panel which issued the order of June 11, 1976, affirming Trial Judge Willi's memorandum and order (dated February 27, 1976), which remanded the case to the Army Board for the Correction of Military Records.

"Having considered the plaintiff's presentation together with the defendant's response, and noting that plaintiff now stresses her claim to back pay because of illegal separation as a major (and consequent retirement pay) rather than her claim to a promotion, the panel hereby vacates the order of June 11, 1976, and sets the case for oral argument before the panel (on an appropriate calendar) on the issue of whether plaintiff now has a good claim for back pay at the rank of major because of an improper separation (and consequent retirement pay). The court treats the motion for reconsideration as plaintiff's motion for summary judgment on that ground, and grants leave to the defendant, if it wishes, to file (within thirty (30) days of this order) a cross-motion for summary judgment on that issue (as well as on plaintiff's entitlement to promotion to lieutenant colonel). The case will be heard orally on plaintiff's motion for sum-

mary judgment and on defendant's cross-motion for summary judgment (if one is filed).

"The usual schedule on motions for summary judgment is dispensed with in this case, and plaintiff is directed to file, within thirty (30) days from the date of this order, a brief supporting her motion for summary judgment. Also within thirty (30) days from the date of this order, defendant shall file its brief in opposition to plaintiff's motion for summary judgment and in support of its own cross-motion for summary judgment (if one is filed). Both briefs may contain whatever documents and other materials are appropriate on such motion or motions for summary judgment. Both briefs shall also discuss whether (a) the selection boards which passed on plaintiff's promotion in 1971 and 1972 were improperly and illegally constituted because of the absence of Reserve officers on those boards, and (b) if so whether plaintiff's subsequent involuntary separation from the Service was improper and illegal. In connection with the first question the parties are requested to discuss the bearing of 10 U.S.C. § 266(a) and 10 U.S.C. § 3362(b) on plaintiff's case, and in connection with both questions to discuss whether there are any controverted factual issues to be determined (aside from the computation of back pay if awarded).

"Each party shall then have 15 days from the date of service of the other party's brief within which to file a reply brief.

"IT IS SO ORDERED."

On December 28, 1976, pursuant to a stipulation of the parties filed December 21, 1976 the court entered judgment for plaintiff for $35,439.59. The court also ordered that the Department of the Army correct plaintiff's military records to show that she was not passed over by selection boards in 1971 or 1972.

No. 464–73. OCTOBER 6, 1976

Southwest Engineering Company, Inc.

Contracts; changes; defective specifications; equitable adjustment.—Plaintiff seeks Wunderlich Act review of a

decision of the Department of Commerce Appeals Board (74–1 BCA para. 10515), on disputes arising in a fixed-price contract for construction of a Weather Bureau radar facility at Monett, Missouri. On April 12, 1976 Trial Judge Kenneth R. Harkins filed a recommended opinion (reported in full at 22 CCF para. 80203) upholding the Board's decision. The Board allowed equitable adjustments and time extensions for extra costs and delays attributable to defective specifications, but denied liability for certain other claims, and plaintiff seeks additional compensation denied by the Board. On October 6, 1976 the court entered the following order:

*Horace Haseltine**, attorney of record, for plaintiff.

Kenneth J. Ingram, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before DAVIS, *Judge*, Presiding, KASHIWA and KUNZIG, *Judges*.

"This case comes before the court on defendant's motion, filed June 10, 1976, requesting that the court adopt in full the recommended decision of Trial Judge Kenneth R. Harkins, filed April 12, 1976, pursuant to Rule 166(c), on plaintiff's motion and defendant's cross-motion for summary judgment, as the basis for its judgment in this case. Plaintiff has filed no formal request for review by the court and has indicated in a letter that it does not accept the trial judge's decision but considers that it would be unduly costly to retain a new attorney to seek and pursue review by the court. Upon consideration, but without oral argument, the court agrees with the trial judge's recommended decision, copies of which have been furnished to the parties, and therefore grants defendant's motion and adopts the said decision as the basis for its judgment in this case.

"IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment is denied, defendant's cross-motion for summary judgment is granted and plaintiff's petition is dismissed."

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*(The court is informed that Mr. Haseltine is now deceased. However, since no substitution has been made for him, his name remains listed as plaintiff's attorney of record.)

No. 290–74. OCTOBER 6, 1976

General Electric Company

Contracts; cost principles; allocation of indirect costs; subcontractor's home-office general and administrative and overhead expenses.—Plaintiff seeks Wunderlich Act review of a decision of the Board of Contract Appeals of the National Aeronautics and Space Administration (73–2 BCA para. 10169), denying plaintiff's claim under a cost-plus-fixed-fee contract for reimbursement of an amount paid by plaintiff to a cost-plus-fixed-fee subcontractor. The Board held that a portion of the subcontractor's overhead and home-office general and administrative expenses was not allocable to the Government work under the subcontract as the term "allocability" is defined in NASA Procurement Regulations, and that the remainder of the amount representing the subcontractor's overhead and home-office expenses were similar in nature to cost items the latter charged as direct costs, thus also making applicable NASA Procurement Regulations. On April 27, 1976 Senior Trial Judge Mastin G. White filed a recommended opinion (reported in full at 22 CCF para. 80240), concluding that the Board did not err in applying said regulations and that plaintiff erred in ignoring them in paying the money to the subcontractor. On October 6, 1976 the court, by order, adopted the said recommended opinion as the basis for its judgment in this case, ordered that plaintiff is not entitled to recover, denied plaintiff's motion for summary judgment, granted defendant's cross-motion, and dismissed the petition.

No. 376–74. OCTOBER 6, 1976

Arnold George Dorsey

Taxes; income tax; deficiency; claim pending before Tax Court; Court of Claims jurisdiction.—On October 6, 1976 the court entered the following order:

Robert A. Schulman, attorney of record, for plaintiff. *Lyman G. Friedman*, of counsel.

Fenton P. Wilkinson, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. *Theodore D. Peyser*, of counsel.

Before DAVIS, *Judge*, Presiding, KUNZIG and BENNETT, *Judges*.

"This income tax case comes before the court on defendant's motion for summary judgment and plaintiff's motion for suspension of proceedings. These motions have been considered without oral argument.

"Plaintiff taxpayer, a British subject and resident of the United Kingdom, filed his petition in this court for a refund of income taxes for 1970 (in the amount of $62,044.74) on October 21, 1974, based upon a refund claim dated March 14, 1974. Thereafter, on May 28, 1975, the Commissioner of Internal Revenue sent taxpayer (in London, England) a notice of deficiency for the same year, 1970. On October 20, 1975, taxpayer petitioned the Tax Court with respect to this notice of deficiency. The Commissioner answered the Tax Court petition on December 19, 1975. On these facts the defendant moves for summary judgment on the ground that under Section 7422 of the Internal Revenue Code this court has lost jurisdiction of the present suit.

"Section 7422 provides in pertinent part that (a) if a taxpayer brings an income tax refund suit in this court, (b) and the Internal Revenue Service thereafter mails to the taxpayer a deficiency notice 'in respect of the tax which is the subject matter' of the suit in this court, (c) provided that such mailing of the deficiency notice occurs prior to the hearing of the suit in this court, (d) then the proceedings in the suit here shall be stayed during the period of time the taxpayer has to petition the Tax Court plus 60 days thereafter, and (e) when the taxpayer petitions the Tax Court (if he does), this court 'shall lose jurisdiction of the taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund.' On the face of this statute this court appears to have lost jurisdiction in this case. No issue has been raised as to the Tax Court's jurisdiction to consider the refund claim previously pressed in this court, and that claim is raised in taxpayer's petition to the Tax Court. Plaintiff's income tax for 1970 can create only a single claim (*Commissioner* v. *Sunnen*, 333 U.S. 591, 598 (1948)), and as to such a single claim a taxpayer can choose between bringing a

refund suit or litigating in the Tax Court 'but he cannot litigate in both.' *See Flora* v. *United States*, 362 U.S. 145, 166 (1960).

"Taxpayer admits that this court lost jurisdiction on the filing of the Tax Court suit to the extent the Tax Court acquired jurisdiction, but suggests that the extent of the Tax Court's acquisition of jurisdiction cannot be finally determined until the Tax Court litigation is concluded; taxpayer therefore suggests that proceedings in this court be suspended until final action by the Tax Court. However, plaintiff presents no reason whatever for thinking that there is any doubt as to the Tax Court's jurisdiction over the subject matter of the present suit or any reason for doubting that that court will determine the refund issues. In these circumstances the appropriate procedure is to dismiss the present suit. Suspension of proceedings here, if available, should be ordered only where there is a substantial issue as to whether the Tax Court has acquired the appropriate jurisdiction.

"IT IS THEREFORE ORDERED AND CONCLUDED that defendant's motion for summary judgment is granted, plaintiff's motion for suspension of proceedings is denied, and the petition is dismissed under Section 7422 of the Internal Revenue Code."

No. 377–74. OCTOBER 6, 1976

Thomas John Woodward

Taxes; income tax; deficiency; claim pending before Tax Court; Court of Claims jurisdiction.—On October 6, 1976 the court entered the following order:

Robert A. Schulman, attorney of record, for plaintiff. *Lyman G. Friedman*, of counsel.

Fenton P. Wilkinson, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. *Theodore D. Peyser*, of counsel.

Before DAVIS, *Judge*, Presiding, KUNZIG and BENNETT, *Judges*.

"This income tax case comes before the court on defendant's motion for summary judgment and plaintiff's motion

for suspension of proceedings. These motions have been considered without oral argument.

"The case is a companion to *Dorsey* v. *United States*, *ante* at 339, and raises the identical question on facts which are practically identical (except for the amounts involved). There is no distinction beween the cases, as to the issue now before us, and the parties make precisely the same arguments. Our order in *Dorsey* v. *United States*, *supra*, is controlling.

"IT IS THEREFORE ORDERED AND CONCLUDED that defendant's motion for summary judgment is granted, plaintiff's motion for suspension of proceedings is denied, and the petition is dismissed under section 7422 of the Internal Revenue Code."

No. 437–74. OCTOBER 6, 1976

Angelo C. Zuaro

Court of Claims jurisdiction; transfer of case to district court.—On October 6, 1976 the court entered the following order:

John I. Heise, Jr., attorney of record, for plaintiff. *Sam Resnicoff*, of counsel.

Leslie H. Wiesenfelder, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before DAVIS, *Judge*, Presiding, KUNZIG and BENNETT, *Judges*.

"This case comes before the court on plaintiff's motion, filed May 19, 1976, to transfer this case to the United States District Court for the District of Columbia, and defendant's opposition thereto. The case has been considered without oral argument.

"Without passing upon the issues which will be before the District Court, the court concludes that it is in the interest of justice to grant plaintiff's motion and to transfer the case under 28 U.S.C. § 1506 to the United States District Court for the District of Columbia so that that court can decide for itself whether plaintiff has presented a claim within the jurisdiction of the district courts.

"This transfer is made on the assumption that plaintiff will seek, as he says he will, to substitute the Maritime Administrator for the United States as party defendant. The Clerk of this court will forward the record in this court to the Clerk of that court.

"IT IS SO ORDERED."

No. 283–75. OCTOBER 6, 1976

Douglas Scott Arey

Pleading and practice; dismissal of action; willful failure to answer interrogatories.—On October 6, 1976 the court entered the following order:

Before DAVIS, *Judge*, Presiding, KUNZIG and BENNETT, *Judges.*

"This case comes before the court on the trial judge's recommendation, filed June 15, 1976, that in accordance with Rule 76(b)(3) the petition herein be dismissed with prejudice for plaintiff's willful failure to answer defendant's interrogatories. Upon consideration thereof, without oral argument,

"IT IS ORDERED that the recommendation of the trial judge be and the same is accepted and adopted and that plaintiff's petition be dismissed with prejudice."

No. 418–75. OCTOBER 15, 1976

Leeway Motor Freight, Inc.

Carriers.—On October 15, 1976 the court entered the following order:

Richard R. Bailey, attorney for plaintiff.

John Charles Ranney, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before DAVIS, *Judge*, Presiding, KUNZIG, and BENNETT, *Judges.*

"The court has considered, without oral argument, defendant's motion for summary judgment filed May 10, 1976;

plaintiff's response to defendant's motion for summary judgment filed June 10, 1976; and defendant's reply thereto filed June 23, 1976. The court finds that the moving papers pose the following dichotomy: If the petition is, as defendant suggests, no more than a suit for the recovery of freight charges, 49 U.S.C. 304a may be controlling and the plaintiff time-barred, since more than three years have elapsed since the date of the last deduction by defendant. If, instead, the case should be considered as a contract claim (other than 'charges'), the applicable statute of limitations may be six years under 28 U.S.C. 2501, and the action not time-barred. The court is aware of the unsettled nature of the law concerning what actions are includable within the purview of the language in 49 U.S.C. 304a—'for the recovery of their charges.' The court finds that this issue and any others deemed pertinent by the parties should be submitted for oral argument before the court, that defendant should be granted leave to file a supplemental statement and brief, and that plaintiff should be granted leave to do the same.

"IT IS THEREFORE ORDERED that defendant is granted leave to file a supplemental statement and brief of not more than twenty-five (25) pages which shall include an analysis of the legislative history and applicable case law supporting the contention that 49 U.S.C. 304a(1) was meant to include claims such as plaintiff's.

"IT IS FURTHER ORDERED that within twenty (20) days of the filing of defendant's brief, plaintiff may file a statement and brief not to exceed twenty-five (25) pages in response.

"Both parties are advised that this case is referred to the Clerk of the Court for calendaring for oral argument on an appropriate calendar after the filing of these briefs."

On January 26, 1977 a stipulation of dismissal was filed, and on the same day the petition was dismissed pursuant to Rule 102(a)(1)(ii).

No. 140–73. OCTOBER 21, 1976

Andrew B. MacEntee

Military pay; release from active duty; Selection Board passovers for promotion.—Plaintiff was discharged from ac-

tive service in the United States Air Force as required by 10 U.S.C. § 8303(d) when he twice failed to be recommended for promotion to permanent Major by Selection Boards. On appeal, the Air Force Board for Correction of Military Records determined that plaintiff had not submitted sufficient evidence to establish a showing of probable error or injustice in the Selection Boards' actions warranting removal of plaintiff's Officer Effective Report (OER) closing November 1968. Plaintiff seeks to have removed from his record the determinations of the Selection Boards, to have voided the allegedly improper OER upon which the Board decisions were allegedly based, to be restored to active duty status with appropriate back pay and allowances, and to be promoted to permanent Major and temporary Lieutenant Colonel with appropriate positioning in promotion lists to make him equal to his contemporaries. On May 3, 1976 Trial Judge Joseph V. Colaianni filed a recommended opinion, finding no convincing proof that the OER in question was prepared in violation of Air Force Regulation, and concluding that there is no error which the Board could be required to correct and that the Board decision must be sustained. On October 21, 1976 the court, by order, adopted the recommended opinion as the basis for its judgment in this case, concluded that as a matter of law plaintiff is not entitled to recover, and dismissed the petition.

No. 408–73. OCTOBER 21, 1976

Alphatype Corporation

Taxes; accumulated earnings tax.—On October 21, 1976 the court entered the following order:

Paul A. Teschner, attorney of record, for plaintiff. *Teschner Professional Corporation*, of counsel.

William Kalish, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. *Theodore D. Peyser* and *Donald H. Olson*, of counsel.

Before SKELTON, NICHOLS, and KASHIWA, *Judges*.

"This case comes before the court on plaintiff's motion for summary judgment, filed May 10, 1976. Plaintiff claims that

it is denied due process of law and equal protection of law because of the uneven application of the accumulated earnings tax to corporations: publicly owned corporations being exempt and application of the tax being limited to corporations, like plaintiff, which are not publicly owned. See *Golconda Mining Corp.* v. *Commissioner*, 507 F. 2d 594 (9th Cir. 1974). Defendant states that there is no support in the statute or legislative history for plaintiff's proposition that the accumulated earnings tax cannot be asserted against publicly held companies. Defendant also states that there is not the slightest evidence that the Commissioner has by ruling, regulation, or official policy exempted such corporations from liability for the accumulated earnings tax.

"Upon consideration of the briefs of the parties, without oral argument, the provisions of the statute, *Golconda Mining Corp.*, *supra*, *Trico Products Corp.* v. *Commissioner*, 137 F. 2d 424 (2d Cir.), *cert. denied*, 320 U.S. 799 (1943), and *Trico Products Corp.* v. *McGowan*, 169 F. 2d 343 (2d Cir.), *cert. denied*, 335 U.S. 899 (1948), it is the court's opinion that the accumulated earnings tax can apply to publicly held corporations. They are included within the statute; Congress had an opportunity to exempt them and did not. Therefore,

"IT IS ORDERED that plaintiff's motion for summary judgment is denied."

No. 89-74. OCTOBER 21, 1976

The Summit Nursing Home, Inc.

Contracts; Medicare Act; Court of Claims jurisdiction; review of provider reimbursement disputes; reasonable costs; remand to agency.—On October 21, 1976 the court entered the following order.

William A. Geoghegan, attorney of record, for plaintiff. *Thomas C. Fox*, *George R. Clark*, and *Pierson, Ball & Dowd*, of counsel.

David R. Schlee, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before COWEN, *Chief Judge*, DAVIS and KASHIWA, *Judges*.

"This case has come before the court on defendant's motion to dismiss the petition. Oral argument was had and the court has considered the briefs and arguments of the parties.

"In response to defendant's challenge to the jurisdiction of this court to consider the case, the court determines that it has jurisdiction. *Whitecliff, Inc. v. United States*, 210 Ct. Cl. 53, 536 F.2d 347 (1976), rehearing denied, September 30, 1976, *cert. denied*, 430 U.S. 969 (1977).

"On the merits of the claim, the court is uncertain as to the present position of the Government concerning the extent and incidence of retroactivity under 42 U.S.C. § 1395x(v). The court has been informed that a proposed regulation on that subject was published in June 1975, but the court has not been told whether that or any other regulation on the subject has been adopted, or what is the present position of the Department of Health, Education and Welfare. That position may be important in the determination of this case. *See Whitecliff, Inc. v. United States, supra*, 210 Ct. Cl. at 62, 536 F.2d at 353, footnote 14. Therefore, without deciding at this time any of the merits issues raised by the parties,* the court remands the case to the Secretary of Health, Education and Welfare pursuant to Rule 149 and this court's remand statute, Pub. L. No. 92-415, 86 Stat. 652 (1972), 28 U.S.C. § 1491 (Supp. IV, 1974), for a renewed determination, by means of such agency, official or tribunal he chooses, of plaintiff's claim pursuant to the present policy and position of the Department of Health, Education and Welfare.

"Further proceedings in this court are stayed for a period of three (3) months from the date of this decision. The parties and the Secretary should also take note of Rule 150.

"IT IS SO ORDERED."

*The court is aware of *Hazelwood Chronic & Convalescent Hospital, Inc v Weinberger*, 543 F.2d 703 (9th Cir. 1976).

No. 436–74. OCTOBER 21, 1976

Howard J. Steen

Pleading and practice; reference of procedural motions.—On October 21, 1976 the court entered the following order.

Maurice F. Biddle, attorney of record for plaintiff.

Julie P. Dubick, with whom was *Assistant Attorney General Rex E. Lee*, for defendant

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Before SKELTON, *Judge*, Presiding, NICHOLS and KASHIWA, *Judges*.

"Plaintiff requests prompt review (Rule 53 (c) (2)), of a trial judge's interlocutory order. The plaintiff challenges the constitutional validity of a non-judicial punishment meted out to him under purported authority of Article 15, U.C.M.J. The trial judge in a pretrial conference memorandum said the evidence, which he held inadmissible, related only to plaintiff's version of the incidents that resulted in the Article 15 punishment. It is apparent that the trial judge had in mind the limitations on the subject matter jurisdiction of this court, stated in *United States v. Augenblick*, 393 U.S. 348 (1969), and its progeny, *e.g.*, *Artis v. United States*, 205 Ct. Cl. 732, 506 F. 2d 1387 (1974). The trial judge has not given the statement referred to in Rule 53 (c) (2) (i), nor does the plaintiff show an irreparable injury nor a manifest waste of resources within the intent of Rule 53 (c) (2) (ii). On the contrary, such a waste of resources would occur if the court attempted a ruling on the thin record now before it. Our denial is, of course, without prejudice to further moves by plaintiff, as *e. g.*, by offer of proof at the trial, to make more specific the nature of the evidence he proposes to offer.

"Upon the record, the request for review, and defendant's response thereto, but without oral argument, it is

"ORDERED, that the request for review aforesaid is denied."

No. 44-75. OCTOBER 21, 1976

Maurice C. Newton and Donna Newton

Military pay; claim for back pay.—On October 21, 1976 the court entered the following order.

Maurice C. Newton, Pro se

LeRoy Southmayd, Jr., with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

"This single motion case comes before the court on defendant's motion to dismiss. The plaintiff, Maurice C. Newton, is an enlisted man in the U.S. Army, currently on the Temporary Disability Retired List (TDRL); he entered military service on November 4, 1965. He was shipped to Vietnam on May 14, 1968. Sometime in December 1968, he was granted a compassionate leave. He returned home, and did not return to military control until July 2, 1974. Since his leave expired on February 12, 1969, he was apparently AWOL from February 13, 1969 through July 1, 1974. This is the period for which he is claiming payment in the petition filed in this court on February 14, 1975.

"After filing the petition, plaintiff moved to continue the case until he could file an application with the Army Board for the Correction of Military Records. Plaintiff's motion was allowed with proceedings stayed until August 13, 1975, with plaintiff's attorney to advise the trial judge of the status of administrative proceedings at intervals of 60 days or less. A subsequent motion for additional time made by plaintiff was allowed by the trial judge on August 21, 1975. However, the Army had notified plaintiff through his attorney, on June 4, 1975, that it had been 'administratively determined that [P's] absence of 13 February 1969 to 1 July 1974 is excused as having been unavoidable.' Further, the Army's letter stated that Maurice C. Newton was entitled to 'full pay and allowances and credit for all purposes for this period.'

"As evidenced by the Military Pay Voucher attached to defendant's motion for dismissal, a U.S. Treasury check dated November 18, 1975, in the amount of $12,948.87 was made payable to the order of Maurice C. Newton and his attorney, Carl R. Trynor; the check was mailed to 97a Ex-

change Street, Portland, Maine 04111 by the Accounting and Finance Officer. Plaintiff had earlier directed in writing, under date of September 12, 1975, that the check in payment of his claim be made payable to himself and his attorney, Carl R. Trynor.

"Plaintiff discharged his attorney, and by an order of the trial judge, filed January 6, 1976, the attorney's motion to withdraw as counsel was allowed with 'Maruce C. Newton having succeeded as counsel of record as counsel *pro se*.' It was further ordered that a December 9, 1975, motion by former counsel for a stay of proceedings 'is denied, and the said counsel *pro se* Maurice C. Newton, is directed to advise the court of the status of any efforts to verify the amount paid to the plaintiff, and to move for a dismissal if the amount paid is found * * * to be correct.'

"As of this date, plaintiff has not complied with this last order of the trial judge. However, it is apparent that plaintiff has been paid, and since he has made no contention to the contrary, it must be assumed that he has been paid the correct amount.

"The plaintiff's claim having already been paid, it is ordered that the defendant's motion to dismiss be granted and the petition is dismissed."

No. 109–75. OCTOBER 21, 1976

Warrior Constructors, Inc.

Pleading and practice; Wunderlich Act review; failure to demand money judgment.—On October 21, 1976 the court entered the following order.

James T. Lewis, attorney of record for plaintiff. *John H. Toole*, and *Lewis, Mitchell & Moore*, of counsel.

Russell W. Koskinen, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before SKELTON, *Judge*, Presiding, NICHOLS and KASHIWA, *Judges*.

"In this case under the Wunderlich Act, 41 U.S.C. §§ 321–22, the plaintiff seeks review of a decision of the Corps of Engineers Board of Contract Appeals. Defendant's cross motion for summary judgment is not the usual one under Rule 163(b) in support of the Board decision, but attacks the jurisdiction of the court. For this reason the trial judge has by order submitted it to the court without a Rule 166 (c) opinion. As he notes, the defendant should have conformed to Rule 163(a) in making its contention and has failed to do so. But we must consider questions as to our jurisdiction, however defectively raised.

"The purported ground of the cross motion is that plaintiff has failed to allege a claim for money damages. Plaintiff does sufficiently assert the existence of disputes under a Government contract concerning extensions of time, adjudication of such disputes by the Board in a consolidated decision, and error in that the Board allowed only enough extension to make the contract completion date conform to the actual completion date, whereas it should have allowed more. Plaintiff further says that allowance of proper time extensions would have entitled it to an equitable adjustment for actual and constructive acceleration and for suspension and disruption of work. Because of the lack of an express demand for a money judgment plaintiff has not complied with Rule 35 (g) and the petition may be considered defective and incomplete. However, it is enough to show inferentially that plaintiff is seeking an equitable adjustment under the contract, which is a kind of money claim within the ordinary and usual jurisdiction of the court. It is the responsibility of the trial judge, under Rule 162 (b)(2), to order an amendment or more definite statement so that the petition will show that the court has jurisdiction without recourse to inference or implication.

"Accordingly, upon the record and briefs of the parties, but without oral argument, it is

"ORDERED, that the defendant's cross motion for summary judgment is denied, without prejudice to proper measures by the trial judge to obtain a sufficient petition."

No. 404–75. OCTOBER 21, 1976

Mark Graff

Civilian pay; Court of Claims jurisdiction; denial of promotion; retroactive reclassification of position; transfer of case to district court.—On October 21, 1976 the court entered the following order.

John I. Heise, Jr., attorney of record for plaintiff.

Carol J. Hansen, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before SKELTON, *Judge*, Presiding, NICHOLS and KASHIWA, *Judges*.

"Plaintiff in this case is presently employed as a GS–12 Research Chemist by the Department of the Navy in its White Oak Laboratory, Naval Surface Weapons Center.

"On or about June 18, 1973, a research evaluation panel was convened at the Naval Ordnance Station to provide an advisory evaluation of plaintiff's position. The panel recommended upgrading plaintiff's position to a GS–13. Thereafter, on September 28, 1973, the principal classifier for the Naval Ordnance Station issued a determination as to plaintiff's position, finding GS–12 to be the proper classification for his position.

"In response to complaints from plaintiff, the classification was reviewed by the Wage and Classification Division of the Naval Ordnance Laboratory, which upheld the classifier's determination. Grievance proceedings followed, and May 23, 1975, the Navy examiner determined finally that plaintiff was properly classified as a GS–12.

"On November 18, 1975, plaintiff filed a petition in the United States Court of Claims seeking a promotion from a GS–12 to a GS–13, retroactive to June 18, 1973, on the ground that the Navy violated its own regulations in denying plaintiff a promotion.

"Presently pending before this court are plaintiff's motions filed June 8 and 9, 1976, respectively, to suspend proceedings in the Court of Claims and to transfer this ac-

tion to the United States District Court for the District of Columbia.

"Defendant has moved to dismiss this action on the ground that the Court of Claims lacks jurisdiction over the claim.

"The parties agree as to the jurisdictional failings of this case in the Court of Claims, under *United States* v. *Testan*, 424 U.S. 392 (1976). In that case, the U.S. Supreme Court dismissed an action by Federal Government trial attorneys for an upward classification on jurisdictional grounds, holding that 'Congress has not made available to a party wrongfully classified the remedy of money damages through retroactive classification.' (424 U.S. at 403). The only question facing this court is, therefore, whether this action should be dismissed for lack of jurisdiction as defendant claims, or whether it should be transferred to the U.S. District Court under 28 U.S.C. § 1506. (It is settled law that under this section a case which is outside the jurisdiction of the Court of Claims will be transferred to a district court only if there is some showing that such a transfer would be 'in the interest of justice' and that there is some legal basis for the district court to entertain the suit.) The test of 28 U.S.C. § 1506 is thus twofold. Is it in the interest of justice to transfer the suit, and does the district court have jurisdiction? On the facts of the present case, the answer to both these questions is in the affirmative. Plaintiff has sought administrative and judicial relief since 1973. It would be in the interest of justice to have a final resolution of the issues involved by transferring the action to a proper forum for a full adjudication of the matter.

"The U.S. District Court for the District of Columbia has both subject matter jurisdiction and authority to grant mandamus under 28 U.S.C. § 1361, declaratory judgment under 28 U.S.C. § 2201, and other appropriate relief to carry out or enforce its declaration of plaintiff's rights. A federal question is involved here. Further, the Supreme Court in *Testan* noted that plaintiffs in that action could seek relief by way of mandamus in a federal district court. The scope of authority granted to district courts under 28 U.S.C. § 1361 includes both those situations where the official failed to comply with a specific statutory or regulatory directive

and those instances where the official has abused his discretion.

"It is plain that 28 U.S.C. § 1506 was enacted to establish a procedure for orderly transfer of suitable cases from the Court of Claims to U.S. District Courts. This court need not concern itself further with detailed facts in this case. Examination of the procedure which denied this plaintiff a promotion and his entitlement to a salary adjustment, if any, are now matters for district court consideration.

"Accordingly, without oral argument, it is ordered that defendant's motion to dismiss is denied, and plaintiff's motion to suspend proceedings and to transfer the case to the United States District Court for the District of Columbia is granted, and the case is accordingly transferred to that court."

No. 446–75. OCTOBER 21, 1976

Philadelphia Suburban Corp.

Pleading and practice; third-party practice; notice.—On October 21, 1976 the court entered the following order:

Richard D. Malmed, attorney of record for plaintiff. *Hart, Childs, Hepburn, Ross & Putnam*, of counsel

Carol J. Hansen, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

John Lansdale, attorney of record for third party defendant. *Cox, Langford & Brown*, of counsel.

Before SKELTON, *Judge*, Presiding, NICHOLS and KASHIWA, *Judges*.

"Plaintiff, doing business as National Foam System, Inc. ('National Foam') filed a petition against the United States in this court on December 22, 1975. The petition alleges that on January 31, 1975, two vessels collided in the Delaware River, resulting in a severe fire which lasted several days. It is alleged that the U.S. Coast Guard assumed charge of the firefighting operation, and in the course of such efforts, requested National Foam to provide foam to put out the fire. It is claimed that National Foam did provide the foam as requested, but that the Coast Guard refused to pay for it.

"On February 17, 1976, the defendant United States answered, contending that the facts fail to establish any contract between the Coast Guard and National Foam. The defendant also moved for the issuance and service of a notice notifying B. P. Oil, Inc. ('B.P.') to appear as a party in the action on the basis that B.P.'s presence at and participation in the fire fighting efforts might have resulted in a contract between B. P. and National Foam for the provision of foam used in extinguishing the fire. The Government's motion was granted, and on April 15, 1976, the notice was served on B.P. at one of its refineries.

"B.P. contends that this court lacks jurisdiction over B.P. because B.P. has no 'interest' in the pending suit as required by 41 U.S.C. § 114(b) and Rule 41(a)(1) of the Rules of the Court of Claims. The case is before the court on B.P.'s motion to quash the notice and to dismiss the action against it. Defendant United States has filed its opposition to the motion to quash and dismiss.

"The only requirement for notice is that the party to be noticed *appears* to have an interest in the proceedings. *Bouchard Transportation Co.* v. *United States*, No. 12–76 (order of trial judge filed April 5, 1976). B.P.'s personnel were on the scene of the fire, were involved in the firefighting efforts, and were engaged in discussions with National Foam regarding the use of foam. Therefore, B.P.'s interest in this suit is quite apparent.

"B.P. has argued that its appearance as a third party is not essential to litigation of the claim by National Foam against the Government and notice therefore should be quashed. This, however, is not the proper test for notice.

"The rationale behind the issuance of a notice is the prevention of numerous proceedings and determinations on an identical set of facts. Thus it is in furtherance of the conservation of judicial time and effort that the Court of Claims determines that notice shall issue where interest is apparent.

"In the case of *Carrier Corp.* v. *United States*, 209 Ct. Cl. 267, 534 F. 2d 250 (1976), notice was issued to a potential indemnitor in a patent infringement action. In ordering the issuance of a notice, the court clearly stated that interest of the third party in the suit was by no means certain, but

that interest was apparent and a notice was therefore desirable. Under Rule 41(a)(1) a notice may be issued to any person 'who appears to have an interest in the subject matter of any pending suit to appear as a party and assert his interest therein.' A person against whom the United States alleges a non-frivolous claim for indemnity is a party who '*appears*' to have such an interest. (*Carrier Corp.*, 209 Ct. Cl. at 269.) Here, the United States has alleged a non-frivolous claim against B.P., which appears to have an interest in the present suit. Therefore, the notice was properly issued.

"For the foregoing reasons, and without oral argument, IT IS ORDERED that B.P. Oil, Inc.'s motion to quash the notice and dismiss the action against it is denied."

On January 7, 1977 the court denied B.P.'s motion for rehearing.

No. 29–76. OCTOBER 21, 1976

Philip H. and Frances V. York

Taxes; income tax; limitations on credit or refund.—On October 21, 1976 the court entered the following order.

Walter L. Abbey, attorney of record for plaintiff. *Kendrick, Kendrick & Bradley*, of counsel.

Joan S. Pate, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. *Theodore D. Peyser*, and *Donald H. Olson*, of counsel.

Before SKELTON, *Judge*, Presiding, NICHOLS and KASHIWA, *Judges*.

"This tax case is before us on defendant's motion to dismiss. On March 10, 1975, plaintiffs filed income returns for their calendar years 1963–69. For 1963–66, they show that withholding exceeded their tax liability for those years, which they now seek to recover by credit against other tax liability. Defendant says the limitations on credit or refund in Section 6511 of the Internal Revenue Code, 26 U.S.C. § 6511, bar this claim, particularly the provision of § 6511(b) that the credit or refund shall not exceed the portion of the tax paid within three years of filing the claim with other

provisions not here relevant. The dates the several returns were due are deemed the dates of paying the amounts withheld in the corresponding periods, and such dates in no instance are within the 3-year period. *Garvin* v. *United States*, 124 Ct. Cl. 781, 111 F. Supp. 265 (1953); *Chemical Bank* v. *United States*, 275 F. Supp. 26 (S.D.N.Y.), *affirmed* 386 F. 2d 995 (2d Cir. 1967). Plaintiffs' argument that they did not pay their 1963–66 taxes until they filed returns is rejected as contrary to the facts and the law.

"Accordingly, upon the motion and briefs of the parties, but without oral argument, IT IS ORDERED, that the petition is dismissed."

No. 31–76. OCTOBER 21, 1976

William G. Pitman and Margherite Pitman

Eminent domain; taking; what constitutes.—On October 21, 1976, the court entered the following order:

John J. Schneider, attorney of record, for plaintiff. *Kayton, Schneider, Levy and Stieh*, of counsel.

Lawrence B. Cozzens, with whom was *Assistant Attorney General Peter R. Taft*, for defendant.

Before SKELTON, NICHOLS, and KASHIWA, *Judges*.

"This case comes before the court on defendant's motion for judgment on the pleadings, filed May 24, 1976, on the ground that the complaint fails to state a claim upon which relief can be granted. For the reasons below we hold for the defendant.

"Plaintiffs allege a taking of their land. Plaintiffs own real property within the boundaries of the Tocks Island Reservoir project. In 1973 the Army Corps of Engineers notified the plaintiffs in writing that their property was the subject of Government acquisition and that it would be appraised. Plaintiffs received from defendant a written offer to purchase. Defendant and plaintiffs negotiated. Defendant made a final offer which was refused. On June 1, 1974, plaintiffs acquired a residence outside the boundaries of the project

placing an encumbrance upon the subject property to finance the new acquisition. On December 13, 1974, plaintiffs were notified that efforts to acquire their property had been suspended. Plaintiffs claim that the marketability of their property has been destroyed. Plaintiffs claim that by virtue of its actions and activities defendant has appropriated the property for public use.

"The issue is whether plaintiffs' allegations state a claim of taking of property for which they are entitled to just compensation.

"There have been cases in which a taking was held to have occurred even though defendant did not literally take in the ordinary way. *United States* v. *Causby*, 328 U.S. 256 (1946); *Drakes Bay Land Co.* v. *United States*, 191 Ct. Cl. 389, 424 F. 2d 574 (1970). It has also been held that a diminutive effect on the value of private land resulting from the proper exercise of Government powers does not alone amount to a constitutional taking. *Danforth* v. *United States*, 308 U.S. 271, 285 (1939); *Woodland Market Realty Co.* v. *Cleveland*, 426 F. 2d 955, 958 (6th Cir. 1970).

"In the case at bar, plaintiffs have alleged no physical invasion nor special circumstances where there was a substantial destruction of their beneficial ownership. A threat of condemnation is not a taking. *Hempstead Warehouse Corp.* v. *United States*, 120 Ct. Cl. 291, 306, 98 F. Supp. 572, 573 (1951). Plaintiffs have not been deprived of their use. There is no taking in the constitutional sense. For the above reasons,

"IT IS ORDERED that defendant's motion for judgment on the pleadings is granted and the petition is dismissed."

No. 47-76. OCTOBER 21, 1976

Paul Zerbe

Court of Claims jurisdiction; tort claim; revocable license or permit.—On October 21, 1976 the court entered the following order.

Robert Hurly, attorney of record for plaintiff.

C. David Redmon, with whom was *Assistant Attorney General Peter R. Taft*, for defendant. *Lawrence B. Cozzens*, of counsel.

Before SKELTON, *Judge*, Presiding, NICHOLS and KASHIWA, *Judges*.

"Defendant has moved to dismiss this action for lack of subject matter jurisdiction. Plaintiff complains of the cancellation of a permit to occupy land on the Fort Peck Indian Reservation. It was, according to its terms, terminable and revocable at the discretion of the approving officer. If an action for termination of a license terminable at will lies at all, it sounds in tort and is not within our subject matter jurisdiction. *Isthmian Airways, Inc.* v. *United States*, 94 Ct. Cl. 598 (1941).

"Accordingly, on the petition, the motion, and the briefs, but without oral argument, it is concluded that the court does not have jurisdiction of the subject matter of the case, and the petition is therefore dismissed."

No. 131–76. OCTOBER 21, 1976

Bannercraft Clothing Co., Inc.

Renegotiation of contracts; failure to file bond to stay execution of order of Renegotiation Board.—On October 21, 1976 the court entered the following order.

Gilbert A. Cuneo, attorney of record for plaintiff. *Sellers, Conner & Cuneo, Robert L. Ackerly, James J. Gallagher* and *Jeffrey P. Altman*, of counsel.

Richard J. Webber, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before SKELTON, *Judge*, Presiding, NICHOLS and KASHIWA, *Judges*.

"This single motion case is before the court on defendant United States' motion for judgment in aid of execution. In an order dated December 24, 1975, the Renegotiation Board determined that plaintiff realized excessive profits in the gross amount of $75,000 for the fiscal year ended December 31, 1968, and that, after proper adjustment for non-federal taxes measured by income attributable to plaintiff's non-excessive profits, the amount of excessive profits to be

eliminated was $61,615. By letter of January 16, 1976, the Internal Revenue Service advised the Board that plaintiff was entitled to a Federal Income Tax Credit in the amount of $32,532.73, which left a net amount of $29,082.27 due and owing to the United States.

"On March 23, 1976, plaintiff filed its petition, requesting this court to find that plaintiff's profits for its fiscal year 1968 were reasonable and not excessive. Plaintiff did not file the required 100 percent bond pursuant to Rule 26(b) of the Court of Claims within the statutory ten day filing period. Defendant filed its answer and counterclaim contemporaneously with its motion for judgment in aid of execution.

"Plaintiff was required by 50 U.S.C. App. § 1218 (Supp. IV 1974) to file a 'good and sufficient bond' within ten days after the filing of its petition. Rule 26(b) requires that the bond be 100 percent. This court has held on previous occasions that the filing of a 100 percent bond is required to stay the execution of the Renegotiation Board's order during de novo determination in this court. *See, e.g., Bannercraft Clothing Co.* v. *United States*, 207 Ct. Cl. 199, 518 F.2d 605 (1975); *Manufacturers Service Co.* v. *United States*, 207 Ct. Cl. 185, 518 F.2d 1202 (1975); *Amco Electric Co.* v. *United States*, 206 Ct. Cl. 880 (1975); *Mancon Liquidating Corp.* v. *United States*, 206 Ct. Cl. 881 (1975). Further, the plaintiff, in its response to defendant's motion, filed June 18, 1976, has indicated its nonopposition to defendant's motion.

"Because plaintiff has failed to file the required bond, IT IS ORDERED that a judgment in aid of execution be entered in the amount of $29,082.27, plus interest from January 23, 1976, at the rate provided by law."

Nos. 133–76, 150–76, 175–76, 176–76. OCTOBER 21, 1976
Marie Antoinette T. Uhl

Court of Claims jurisdiction; tort claims.—On October 21, 1976 the court entered the following order.

Marie Antoinette T. Uhl, Pro se

John W. Showalter, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before SKELTON, *Judge*, Presiding, NICHOLS and KASHIWA, *Judges*.

"In this single motion case, the plaintiff has filed four separate actions which have been combined into one case and which is before the court on defendant's motion to dismiss.

"While the exact nature of plaintiff's claim is somewhat unclear, the essence of her petitions in 133–76 and 150–76 appears to be that the Commission of the District Court of Essex County located in Baltimore issued a 'judicial document' in proceedings styled CC B5 22811. The document is evidently a summons issued to Robert H. Uhl commanding him to appear before that court to answer charges brought against him by plaintiff. Plaintiff claims that the 'equal protection of the laws of the U.S. Constitution' has somehow been denied to her through the issuance of this summons, and 'for this Behavior' her compensation in a joint action against the State of Maryland and the Federal Government should be '$2,400,000 in cash' in 133–76 and $52,000,000 in 150–76.

"In 175–76, plaintiff alleges that two representatives of a nursing home located in Maryland refused plaintiff entry. Thereafter, plaintiff alleges that a judicial officer of the State of Maryland 'withheld knowledge to a show cause summons for the slander and degradation to plaintiff's person.'

"In 176–76, plaintiff alleges that a ministerial officer of the judicial system, the Registrar of Wills Administration, injured plaintiff in regard to the estate of her aunt.

"Plaintiff's claims must be dismissed. First of all, plaintiff's alleged causes of action are clearly in the nature of torts. This court has no original tort jurisdiction under the court's general jurisdictional statute, 28 U.S.C. § 1491 (1970). *See also*, *Vincin* v. *United States*, 199 Ct. Cl. 762, 468 F. 2d 930 (1972) and *Marcee* v. *United States*, 197 Ct. Cl. 363, 455 F. 2d 525 (1972).

"Secondly, plaintiff's claim, if she had one, would be against the State of Maryland and not the United States. Plaintiff points to no constitutional provision, statute or contract whereby the United States has assumed liability for acts committed by officials and citizens of the State of Maryland.

"Accordingly, IT IS ORDERED that defendant's motion to dismiss is granted and plaintiff's petitions are dismissed."

No. 235–76. OCTOBER 21, 1976

Builders International (Senegal) S.A.

Court of Claims jurisdiction; arbitration; confirmation of arbitral award.—On October 21, 1976 the court entered the following order.

John Vanderstar, attorney of record for plaintiff. *Covington & Burling, of counsel.*

Richard J. Webber, with whom was *Assistant Attorney General Rex E. Lee*, for defendant. *James F. Merow*, of counsel.

Before SKELTON, *Judge*, Presiding, NICHOLS and KASHIWA, *Judges.*

"This application for confirmation of an arbitral award was transferred here from the United States District Court for the District of Columbia. It is before the court on plaintiff's motion to establish expedited procedures and defendant's motion to dismiss and to suspend proceedings on the plaintiff's motion.

"During 1968, petitioner obtained financing from several investors to construct low-cost housing in Senegal. The United States, through the agency for International Development (AID), guaranteed the loans and joined with petitioner in a so-called Company Agreement. After the project was discontinued, a dispute arose between petitioner and AID over their respective financial responsibilities under the Company Agreement. In February 1973, petitioner requested arbitration before the Arbitral Tribunal of the International Chamber of Commerce (ICC), and AID agreed to submit the dispute to arbitration as provided in the Company Agreement. On March 16, 1976, the Arbitral Tribunal concluded that AID had materially breached the contract of guaranty between it and petitioner, and issued a final award against the United States in the amount of $495,898.45, plus 75 percent of the costs of arbitration.

"In support of its request for a confirming order, petitioner relies on 9 U.S.C. § 9 (1970), which provides that such an order shall be entered upon an arbitral award unless certain defects during the arbitration justify the court to modify or correct the award. The Government objects that

petitioner cannot rely solely on § 9, but must first assert a monetary claim against the United States under 28 U.S.C. § 1491, the Tucker Act.

"Thus, at the heart of the matter before us today is the character of Title 9, United States Code. This court has not yet had the occasion to consider what task is assigned to us by this statute, if any, or to decide what facet of our limited jurisdiction we might exercise in performing it. There is, nevertheless, consistent authority in other Federal courts which conforms to the rule of *Krauss Bros. Lumber Co.* v. *Louis Bossert & Sons*, 62 F. 2d 1004, 1006 (2d Cir. 1933) (L. Hand, J.), that Title 9 cannot be read by itself to confer jurisdiction upon the District Courts.

"Where the United States is the defendant, the consent to be sued must be clear and unequivocal. *United States v. Testan*, 424 U.S. 392 (1976). We must first identify an independent source of our own jurisdiction in this matter before proceeding to the issues raised by the arbitration award under Title 9. Our jurisdiction will be provided by the Tucker Act, of course, so long as petitioner means to assert a claim against the United States founded on a contract, or an act of Congress. Once it clarifies its pleading to assert a money claim against the United States, petitioner can assert the arbitration award in support of its entitlement to payment, and the court can hear the Government's substantive objections. But these questions are not before us now, for petitioner has not yet pleaded a claim that we can recognize under § 1491. A 'confirmation of arbitral award' may be a remedy appropriate in this case and available in this court under Title 9, or the award may be given effect in some other way, but we reach that stage of this proceeding only after this court's jurisdiction is properly invoked. At that time the parties can put the case before the court by cross motions for summary judgment, if that is the procedure they elect. See Rules 14 (b) (2) and 101.

"Accordingly, upon consideration of the pleadings, respondent's motion to dismiss and petitioner's opposition thereto, and the briefs and representations of the parties but without oral argument, IT IS ORDERED that the motion to dismiss be granted, without prejudice and with leave for peti-

tioner to amend its pleadings, under Rule 39(a)(1). Plaintiff's motion to establish expedited procedures is suspended as defendant requests."

No. 17–67. October 28, 1976

Instruments for Industry, Inc.

Contracts; disputes; finality of administrative findings.—On October 28, 1976 the court entered the following order:

Branko Stupar, attorney of record for plaintiff. *Michael A. Steuer*, of counsel.

Frances L. Nunn, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before SKELTON, *Judge*, Presiding, KASHIWA and KUNZIG, *Judges*.

"This case is before the court on cross-motions for summary judgment.

"The plaintiff seeks review under the Wunderlich Act, 41 U.S.C. § 321 of factual findings and legal conclusions of the Armed Services Board of Contract Appeals (the Board) in two decisions, ASBCA No. 10543 and ASBCA No. 11040, relating to a contract awarded to it for the manufacture of a certain electronic device to be used in an aeroplane [see 65–2 BCA para. 5097]. The contract contained a liquidated damage clause which was inserted in the contract by agreement of the plaintiff when the contract price was increased to the extent of $50,000. When the plaintiff failed to deliver the device at the times stated in the contract, the Government assessed liquidated damages against the plaintiff in the sum of $136,136.80. The plaintiff appealed to the Board in No. 10543 asking for a remission of such damages on the following grounds: (1) it is entitled to additional time because of a constructive change made by defendant requiring the device to operate in a pod instead of in an aeroplane; (2) the delays were excusable within the meaning of the Default Clause (Clause 11, Standard Form 32, 1957 ed.); (3) the Government waived the delivery date, and (4) the

amount imposed was intended by the Government as a penalty and was therefore unenforceable.

"The Board made factual findings against these contentions of the plaintiff and held that the plaintiff was not entitled to a remission of the liquidated damages. The plaintiff has not specifically challenged any of these factual findings of the Board, and sues here in Count I of its amended petition for the recovery of such liquidated damages.

"In the other (and later) appeal to the Board, in No. 11040, the plaintiff asked for an equitable adjustment on the following grounds: (1) the specifications were erroneous or ambiguous; (2) the contract was impossible of performance; (3) the Navy misrepresented the facts, (4) the Navy had superior knowledge and withheld information from the plaintiff, and (5) the Government had made a constructive change in the contract. The Board found all of these facts against the plaintiff, and the plaintiff did not specifically challenge any of these factual findings but sues here in Count II of its amended petition for an equitable adjustment on the same factual allegations.

"The trial judge of our court entered an order stating that since the plaintiff had not specifically challenged any of the factual findings of the Board as required in a Wunderlich Act case by our Rule 163(b)(3)(iii), the factual findings of the Board must be accepted as correct, and our review is limited to whether the Board reached erroneous conclusions of law on the facts found by it. The trial judge returned the case to the court for our judicial review of issues of law within the purview of Section 2 of the Wunderlich Act (41 U.S.C. § 322).

"In the two appeals, the Board concluded on the facts found by it that there was no constructive change made by the defendant in the contract; the plaintiff's delays in delivering the device was not excusable within the meaning of the default clause; there was no waiver by the Government of the delivery dates; the liquidated damage provisions in the contract was not a penalty and was enforceable; the specifications were not erroneous or ambiguous; the contract was not impossible to perform; the plaintiff assumed the risk

of performance; and plaintiff was not entitled to a remission of the liquidated damages nor to an equitable adjustment.

"We have carefully considered these conclusions of law reached by the Board on the facts found by it, and are of the opinion that such conclusions are correct and should be approved.

"Accordingly, the findings of fact and conclusions of law in the two appeals aforesaid are approved and affirmed. Plaintiff's motion for summary judgment is denied and that of the Government is granted, and plaintiff's petition is dismissed."

On January 7, 1977 the court denied plantiff's motion for rehearing *en banc* and for rehearing.

No. 60–71. OCTOBER 28, 1976

Ampex Corporation

Pleading and practice; attorneys; dual role of advocate and witness.—On October 28, 1976 the court entered the following order.

Donald Flynn, attorney of record, for plaintiff. *Michael Waris, Jr.*, *J. P. Powers*, and *Baker & McKenzie*, of counsel.

Gilbert Rubloff, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant.

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, *Judges*, *En Banc*.

"This case comes before the court on defendant's request for prompt review of the order of Trial Judge Harry E. Wood, dated September 3, 1976, clarifying the status of counsel for plaintiff, and on defendant's motion for oral argument thereon, as well as its suggestion for a hearing *en banc*. The court has considered those documents and the plaintiff's response thereto.

"The court accepts defendant's suggestion that the matter be considered *en banc* and so orders, but denies the motion for oral argument.

"The request for review brings before us the Trial Judge's order that plaintiff's counsel may continue in the case al-

though counsel intends to call a member of his law firm as a witness to testify at the trial. The court agrees with the Trial Judge's order. Disciplinary Rules 5–101 and 5–102, which concern the situation of the law firm's member being called as a witness, are primarily for the benefit of clients and courts, not to protect or further the interests of opposing counsel (the status of the Department of Justice in this case) or the opposing party (the status of the defendant in this case). Here, as the Trial Judge has pointed out, the 'plaintiff, with full awareness of defendant's questioning of plaintiff's continued representation by the law firm, has stated that withdrawal would work grave hardship, result in unfairness, and cause inordinate expense, and has urged "in the strongest terms possible" that the law firm continue to represent it in this litigation.' In addition, there are other circumstances which support the view that neither the plaintiff nor the court will be harmed by the continuance of present counsel, and we can conceive of no injury to any proper interest of the defendant or the Department of Justice. The court concurs with the Trial Judge that, as Disciplinary Rules 5–101 and 5–102 should be interpreted, no violation thereof has been shown in this case.

"IT IS THEREFORE ORDERED that the Trial Judge's order of September 3, 1976, is affirmed and the defendant's request for review is denied."

No. 137–74. OCTOBER 28, 1976

Ravenna Arsenal, Inc.

Contracts; changes; constructive change.—Plaintiff seeks Wunderlich Act review of a denial of its claim by the Armed Services Board of Contract Appeals (74–1 BCA para. 10375) for additional compensation for reworking of 130,000 155mm shells directed by defendant. Plaintiff claims that the specification was changed by the practice of the parties—or by acquiescence of defendant in the practice of plaintiff alone—of measuring cracks in the shells at their narrowest width; and also claims that defendant's insistence upon or resurrection or reimposition of the contract standard was a constructive change. The Board held that both parties had used

only the standard of the contract—that measurement of cracks take place at their widest width. On March 8, 1976 Trial Judge David Schwartz filed a recommended opinion (reported in full at 22 CCF para. 80126) upholding the decision of the Board. On October 28, 1976 the court, by order, adopted the recommended decision as the basis for its judgment in this case, denied plaintiff's motion for summary judgment, granted defendant's cross-motion, and dismissed the petition.

No. 328–74. OCTOBER 28, 1976

Roger Alexander

Civilian pay; reduction-in-force.—On October 28, 1976 the court entered the following order.

Leonard F. Lybarger, attorney of record, for plaintiff. *Rudd, Karl, Sheerer, Lybarger & Campbell Co., L. P. A.*, of counsel.

Susan M. Linden, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before NICHOLS, *Judge*, Presiding, KASHIWA and KUNZIG, *Judges*.

"This civilian pay case comes before the court on cross motions for summary judgment. There is no genuine issue as to any material fact.

"Plaintiff, a preference eligible veteran, was an employee of the National Aeronautics and Space Administration (NASA) at its Lewis Research Center in Cleveland, Ohio. Pursuant to a reduction-in-force (RIF) involving separation of 81 employees, plaintiff was duly separated from Federal employment on October 2, 1971, upon a finding that he had no mandatory right to displace or 'bump' any other employee.

"Plaintiff appealed his separation to the Civil Service Commission (CSC), Chicago Region Office. That office, after personal appearance by plaintiff, sustained plaintiff's RIF separation. On timely appeal to the CSC's Board of Appeals

and Review (BAR), that Board affirmed plaintiff's RIF separation.

"Plaintiff thereupon filed suit in this court seeking back pay and attorneys' fees and costs. Upon consideration of the parties' briefs submitted with their respective motions and supporting documents and after oral argument by counsel, the court finds:

"(1) The CSC correctly concluded in a detailed, thorough and supported decision that plaintiff's separation was accomplished through a valid RIF procedure in accord with all applicable personnel regulations and violated none of plaintiff's separation rights. The facts of this case support the determination that plaintiff was provided all procedural requirements of the regulations applicable to RIFs.

"RIF procedures are not adverse actions and since plaintiff has failed to convince the court that his RIF separation was in fact a disguised adverse action, plaintiff was not entitled to a full evidentiary hearing. *Wilmot* v. *United States*, 205 Ct. Cl. 666, 679 (1974).

"(2) The determination by NASA, affirmed by the CSC and the BAR, that plaintiff had no mandatory assignment rights to displace any other employee is supported by substantial evidence in the administrative record.

"Plaintiff contends that he was wrongfully denied the right to 'bump' an individual in another series designation whose position plaintiff considered to be very similar to his own. The agency, the CSC and the BAR fully considered and rejected plaintiff's arguments. This court has consistently held that it is the job of the agency to decided what reassignments would unduly interrupt its work program. Administrative decisions are presumed to be correct and will be upset judicially only where it is shown that the discretion vested in the agency officials has been abused or is in excess of their authority, or where the result is unsupported by substantial evidence, or is contrary to law or regulation. *Wilmot* v. *United States*, *supra*, at 682; *Grover* v. *United States*, 200 Ct. Cl. 337, 343 (1973); *Morelli* v. *United States*, 177 Ct. Cl. 848, 858 (1966); *Keener* v. *United States*, 165 Ct. Cl. 334, 339 (1964); *Harrington* v. *United States*, 161 Ct. Cl. 432, 442 (1963). Plaintiff has failed to establish that the decision by

the BAR, affirming the NASA and the CSC determinations, was arbitrary, capricious, unsupported by substantial evidence or contrary to law or regulation. Therefore,

"IT IS ORDERED that plaintiff's cross motion for summary judgment be and is hereby denied, that defendant's motion for summary judgment be and is hereby granted and that plaintiff's petition be and is hereby dismissed."

No. 102–75. OCTOBER 28, 1976

Raymond Boylan

Civilian pay; dismissal; Internal Revenue employee.—On October 28, 1976 the court entered the following order.

Sidney J. Guran, attorney of record for plaintiff.

Gerald L. Schrader, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

Before COWEN, *Chief Judge*, DAVIS, *Judge* and BENNETT, *Judge*.

"This case comes before the court on Defendant's Motion for Summary Judgment and Plaintiff's Cross-Motion for Partial Summary Judgment. Upon consideration of the motions, the briefs of the parties and the administrative record, and after hearing oral argument, the court finds:

"1. Plaintiff, a veterans preference eligible, employed in the competitive Civil Service as a criminal investigator by the Internal Revenue Service, was notified by letter of August 8, 1969, that the agency proposed to remove him based upon the following charges: (a) Improper disposition of hand guns abandoned to the Government in violation of the rules of conduct for Service employees and the Internal Revenue Manual; (b) Failure to obtain 'Notice of Abandonment of Property' as required by the Internal Revenue Manual; (c) Failure to prepare a 'Local Investigation Assignment and Record' as required by established office practice and procedures, and (d) Conduct which brings discredit upon the individual as a Federal employee and on the Service.

"2. After the plaintiff had filed a written reply and also made an oral reply, the Assistant Regional Commissioner ordered plaintiff removed from the Service effective October 17, 1969. Plaintiff appealed to the Director of the Per-

sonnel Division and a designated hearing officer conducted a hearing at which both sides presented witnesses and documentary evidence, at the conclusion of which, the hearing officer found that all except the fourth charge described above were sustained, and a decision sustaining plaintiff's dismissal was issued.

"3. After the plaintiff timely appealed, a hearing was held by the New York Regional Office of the Civil Service Commission. Part of the evidence against plaintiff consisted of an affidavit by an Air Force officer, and plaintiff's attorney objected to the failure of the officer to appear and testify in person. Plaintiff requested an adjournment, which was denied, and the parties submitted a joint set of written interrogatories which were answered and returned by the Air Force officer. Thereafter, on October 16, 1970, the Regional Director of the Commission rendered a written decision sustaining the removal action on the basis of findings that the procedural requirements of the law and regulations had been complied with; that the four charges and specifications were sustained by a preponderance of the evidence, and that the removal action was taken for such cause as would promote the efficiency of the Service. On plaintiff's appeal, the Civil Service Commission Board of Appeals and Review affirmed the decision on February 4, 1971.

"4. On January 25, 1972, plaintiff commenced an action in the United States District Court for the Eastern District of New York, seeking reinstatement to his position and recovery of back pay. By stipulation of the parties, the action was dismissed without prejudice to the commencement of a new action, and on April 3, 1975, plaintiff filed suit in this court to recover back pay on the grounds that the administrative decisions were without substantial support in the evidence; that he was denied the right to confront witnesses against him, and that he was denied the right to have present witnesses whose testimony was favorable to his defense.

"After careful review of the complete administrative record and a consideration of the briefs and argument of counsel for the parties, the court finds that the administrative decisions with respect to at least the first three of the charges against plaintiff are supported by substantial evidence; that

plaintiff was removed in accordance with applicable statutes and regulations, and that plaintiff has failed to demonstrate that the administrative action was arbitrary, capricious, malicious or taken in bad faith. Accordingly, we conclude that plaintiff may not recover. *Boyle* v. *United States*, 207 Ct. Cl. 27, 515 F. 2d 1397 (1975); *Holman* v. *United States*, 181 Ct. Cl. 1, 383 F. 2d 411 (1967); *Finn* v. *United States*, 152 Ct. Cl. 1 (1961).

"The court also concludes as a matter of law that the failure of the administrative agencies to produce the Air Force officer as a witness at the hearings, as well as the defendant's reliance on the witness' affidavit and sworn answers to the interrogatories, was not legally erroneous, arbitrary, or capricious. Reasonable efforts were made to procure the attendance of the witness at the hearings, but he failed to appear. Neither the Internal Revenue Service nor the Civil Service Commission had administrative control over the witness and neither had the authority to subpoena him to testify in person. See *Peters* v. *United States*, 187 Ct. Cl. 63, 408 F.2d 719 (1969).

"IT IS THEREFORE ORDERED that Defendant's Motion for Summary Judgment is granted; Plaintiff's Cross-Motion for Partial Summary Judgment is denied, and plaintiff's petition is dismissed."

No. 111–75. OCTOBER 28, 1976

Manufacturers Hanover Trust Company and William S. Fox, Executors of the Estate of Paul E. Kern, Deceased

Taxes; estate tax; refund of interest on overpayment.—On October 28, 1976 the court entered the following order.

Eugene L. Vogel, attorney of record for plaintiffs. *Richard E. Halperin*, of counsel.

David C. Hickman, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. *Theodore D. Peyser* and *Donald H. Olson*, of counsel.

Before COWEN, *Chief Judge*, DAVIS, *Judge* and BENNETT, *Judge*.

"This case comes before the court on Plaintiffs' Motion for Summary Judgment and Defendant's Cross-Motion for Partial Summary Judgment. Upon consideration of the motions, briefs and affidavits of the parties, and after hearing oral argument, the court finds:

"1. After the death of Paul E. Kern in 1969, two different documents purporting to be his last will were offered for probate. Under one document, known as the 'Connecticut Will,' only a small portion of his property would have qualified for the marital deduction for federal estate tax purposes, but a substantial portion would have qualified for the charitable deduction. Under the other document, known as the 'New York Will,' the maximum marital deduction would have been allowable, but there would have been no charitable deduction. There was extensive litigation among the proponents of the two wills, both on the issue of the domicile of Kern's widow and the issue as to which will should be admitted to probate. It was not known at any time in 1970 which will would be admitted to probate and what the amount of federal estate tax would be. Therefore, the Preliminary Executors of Kern's estate applied for and obtained an extension to May 3, 1971 for filing the estate tax return. At that time, the Internal Revenue Service stated that the extension would not relieve the estate from the payment of interest on the unpaid tax.

"2. Under Section 6151(a) of the Internal Revenue Code, the estate tax was required to be paid before November 3, 1970, and the Preliminary Executors determined that in order to comply with Section 6151(a) and minimize the imposition of interest, the estate tax payment should be made before November 3, 1970. It was estimated that if the New York will were probated, the federal estate tax would be approximately $973,000, whereas, if the Connecticut will were probated, the estimated tax would amount to either $619,000 or $609,000. It was then decided that the estate tax payment should be in the amount of $850,000, and on October 27, 1970, the Preliminary Executors made a payment in that amount to the Internal Revenue Service.

"3. In April 1971 the proponents of the two wills agreed that the Connecticut will should be admitted to probate, with a distribution to provide a substantial payment to the widow

in a form which qualified for the marital deduction for federal estate tax purposes. The agreement was contingent upon the receipt of a determination by the Internal Revenue Service that the payment to the widow qualified for the marital deduction and also that other payments under the agreement qualified for charitable deductions for federal estate tax purposes. On August 19, 1971, the Internal Revenue Service determined that the estate was entitled to both deductions. Thereafter, on May 3, 1971, an estate tax return was filed indicating a federal estate tax of $168,223.43. The return was made and filed in accordance with the agreement made by the parties.

"4. In 1972, the Internal Revenue Service refunded the difference between the tax paid on October 13, 1970 and the amount shown in the return filed on May 3, 1971.

"5. In 1972 and February 1973, plaintiffs received from the Internal Revenue Service the sum of $56,613.37, which represented interest on the difference between the estate tax paid on October 13, 1970 and the amount of estate tax due as shown on the return of May 3, 1971.

"6. In 1974, the Internal Revenue Service determined that the interest payments should not have been made, because they were considered as a deposit without assessment. The Internal Revenue Service then demanded that plaintiffs refund the $56,613.37, plus $6,657.05 of statutory interest thereon, and this amount was paid by plaintiffs on April 23, 1974.

"7. After filing a timely claim for refund, plaintiffs brought this suit, and by stipulation filed May 5, 1976, all of the claims in plaintiffs' petition were dismissed except their claim for statutory interest on the $56,613.37 paid to the Internal Revenue Service on April 23, 1974. The defendant conceded that plaintiff was entitled to recover the $56,613.37, as statutory interest on a repayment, as well as the $6,657.05 of interest paid by plaintiff in 1974, and statutory interest thereon. Apparently these amounts were paid or credited to plaintiff.

"Based upon the foregoing, the court concludes as a matter of law:

"(a) The estate tax payment which plaintiffs made on October 27, 1970, was a remittance based upon a reason-

able and *bona fide* estimate of the estate tax that would be due on the estate of Mr. Kern. Moreover, the payment was made in the orderly discharge of the duties of the Preliminary Executors, and was transmitted in accordance with established procedures of the Internal Revenue Service; and

"(b) Upon the authority of *Northern Natural Gas Co.* v. *United States*, 173 Ct. Cl. 881, 354 F. 2d 310 (1965) and cases therein cited, and because plaintiffs repaid the $56,613.37 to the defendant in 1974 on demand of the Government when that money was not owing to the Government, the $56,613.37 which plaintiffs paid to the Internal Revenue Service on April 23, 1974, was an overpayment within the meaning of 26 U.S.C. § 6611(a) and Treas. Reg. 301.6611–1.

"IT IS THEREFORE ORDERED that plaintiffs' motion for summary judgment is granted and judgment is rendered in their behalf for statutory interest on $56,613.37 from the date it was paid by plaintiffs.

"IT IS FURTHER ORDERED that defendants' motion for partial summary judgment be and the same is hereby denied."

Cities Service Helex, Inc., No. 138–75

Phillips Petroleum Company, No. 248–76

OCTOBER 28, 1976

Pleading and practice; motion for disqualification of trial judge.—On October 28, 1976 the court entered the following order.

Charles C. Baker, attorney of record for plaintiff, Cities Service Helex, Inc. *Gable, Gotwals, Rubin, Fox, Johnson & Baker, James M. Sturdivant* and *C. A. Coulter*, of counsel.

William H. Allen, attorney of record for plaintiff, Phillips Petroleum Company. *Covington & Burling, Eugene D. Gulland* and *R. Price Howard*, of counsel.

Edward J. Friedlander with whom was *Assistant Attorney General Rex E. Lee*, for defendant. *James F. Merow*, of counsel.

Before SKELTON, *Judge*, Presiding, NICHOLS and BENNETT, *Judges*.

"These cases are before the court on defendant's motion in Cities Service Helex for review of Trial Judge Spector's order of August 19, 1976, denying defendant's motion for disqualification of the trial judge, and on a similar motion of defendant in Phillips Petroleum Company for review of Trial Judge Spector's order of August 25, 1976, denying defendant's motion for disqualification of the trial judge. Both motions for review were made under our Rule 53(c)(2)(ii). Upon consideration thereof and the briefs of the parties, we conclude that both motions should be denied.

"The defendant alleges in both motions as a ground for the disqualification of Trial Judge Spector that in a companion case, *National Helium Corporation*, No. 158–75, involving identical issues and involving *in camera* inspection of identical documents which the defendant claims are privileged, another trial judge (Trial Judge Schwartz), after an *in camera* inspection of the documents, recused himself from the case on the ground that his objectivity as a trier of the facts had been affected by his examination of the documents. The defendant alleges that when and if Trial Judge Spector makes an *in camera* inspection of the same documents he will be similarly affected and for that reason he will be disqualified to try these cases.

"The defendant also alleges that a suggestion by Trial Judge Spector in his order of December 5, 1975, in these cases that to the extent possible the parties should utilize evidentiary material already available from an earlier case, *Northern Helex Co.* v. *United States*, 207 Ct. Cl. 862, 524 F. 2d 707 (1975), *cert. denied*, 429 U.S. 866 (1976), rather than file time-wasteful and duplicating formal motions to produce,[1] indicates that he is disqualified to try these cases. We do not agree.

"The defendant has filed its motion under our Rule 53(c)(2)(ii) which in pertinent part requires 'a showing of extraordinary circumstances whereby further proceedings pursuant to the said order [of Trial Judge Spector refusing to recuse himself] would irreparably injure the complaining

[1] The *Northern Helex* case was tried by Trial Judge Spector. In that case *in camera* inspection of documents was made by the trial judge pursuant to an order of the court (198 Ct. Cl. 996 (1972)), and the court itself made an *in camera* inspection of evidence.

party or occasion a manifest waste of the resources of the court or of the parties.' It is our view that the defendant has not met the burden imposed on it by this Rule.

"The defendant says that Trial Judge Spector should be disqualified because of the provisions of 28 U.S.C. § 455(a) (Supp. V, 1975), which provides:

> (a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

"We have concluded that the defendant has made no showing that Trial Judge Spector's impartiality might reasonably be questioned, and, therefore, the statute does not apply.

"The defendant has not filed an affidavit of personal bias or disqualification of the trial judge, as required by the second sentence of our Rule 14(d), and says that it 'is not attributing personal bias and prejudice to the Trial Judge.' [2]

"The defendant has not shown any sound or convincing reason why the trial judge should be disqualified. The court has full confidence in the integrity of Trial Judge Spector. He is fully qualified to try these cases without bias or prejudice. We are satisfied that if future circumstances change the situation, he himself will make the proper decision with reference thereto.

"Accordingly, IT IS ORDERED that the motions of defendant are denied."

No. 309–75. OCTOBER 28, 1976

Ronald J. Stromfeld

Military pay; retired pay (disability); entitlement to higher disability rating.—On October 28, 1976 the court entered the following order.

Robert M. Draper, attorney of record, for plaintiff. *Craig W. Patton* and *Dargusch and Bell*, of counsel.

Arlene Fine, with whom was *Assistant Attorney General Rex E. Lee*, for defendant.

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[2] The trial judge denied defendant's motions under the first sentence of Rule 14(d), which states that 'a trial judge may at any time withdraw from a case if he deems himself disqualified.'

Before SKELTON, *Judge*, Presiding, KASHIWA and KUNZIG, *Judges*.

"This case comes before the court on plaintiff's motion and defendant's cross motion for summary judgment. There is no genuine issue as to any material fact.

"Plaintiff was discharged from the Air Force with severance pay based on a combined compensable permanent disability rating of 20 per cent. Plaintiff contends that the rating should be 30 per cent and that the compensable disability rating of 20 per cent recommended by the Formal Physical Evaluation Board (PEB), concurred in by the Physical Review Council and approved by the Air Force Personnel Board and the Secretary of the Air Force, is unreasonable and against the weight of the evidence. To support this claim plaintiff makes generalized allegations of a lack of analysis of the evidence by the PEB.

"In addition, plaintiff introduced before oral argument the statements of certain doctors who gave their opinions of what plaintiff's condition was subsequent to his discharge, almost three years after the date of the PEB proceedings. Although the admissibility of such evidence is doubtful and not determinative of the issues presented herein, we assume that it is intended to show that the evidence before the PEB was so incredible that no one undertaking to arrive at a fair and impartial decision could have given it credence. *Johnston* v. *United States*, 157 Ct. Cl. 474, 478 (1962). The evidence introduced by plaintiff in this case falls short of this. Nevertheless, even assuming that the statements by plaintiff's private physicians did in fact bear out plaintiff's contention that he should have received at least a 30 percent rating, the record would then present a pure conflict of medical testimony. The action by the Air Force cannot be said to be arbitrary or capricious or not supported by substantial evidence because one medical view is accepted rather than another. *Weslowski* v. *United States*, 174 Ct. Cl. 682, 692 (1966); *Rae* v. *United States*, 159 Ct. Cl. 160, 170 (1962).

"For plaintiff to prevail in this action, he must show evidence that the action of the Secretary of the Air Force discharging him with a 20 percent disability rating was arbitrary or capricious or contrary to the evidence. *Unterberg* v.

United States, 188 Ct. Cl. 994, 412 F. 2d 1341 (1969); *Ward* v. *United States*, 178 Ct. Cl. 210 (1967); *Furlong* v. *United States*, 153 Ct. Cl. 557 (1961). Plaintiff has failed to establish that the decision by the Secretary of the Air Force, affirming the recommendations of the Formal PEB and the Physical Review Council, was arbitrary, capricious, or unsupported by substantial evidence. Therefore,

"IT IS ORDERED that plaintiff's motion for summary judgment be and is hereby denied, that defendant's cross motion for summary judgment be and is hereby granted, and that plaintiff's petition be and is hereby dismissed."

Nos. 359–72, 333–73, 156–75, 246–75 and 247–75. MAY 20, 1977.

Washington Medical Center, Inc., et al.

Pleading and practice; relief from judgment; newly discovered evidence.—On May 20, 1977 the court issued the following order:

Before COWEN, *Senior Judge*, Presiding, DURFEE, *Senior Judge* and SKELTON, *Senior Judge*.

"This case comes before the court on Plaintiffs' Motion for Relief from Judgment and Remand to Trial Judge for Trial on Issue of Title to Alleyways. [*See ante* at 145.] The motion is made under our Rule 152(b) on the ground of newly discovered evidence, plaintiffs claiming that they have uncovered 'additional compelling evidence to support their title claims.' The alleged newly discovered evidence consists of a book containing a number of documents obtained from the National Archives and the motion is supported by two affidavits. Defendant strongly opposes the motion, asserting that since plaintiffs have had access to the documents in the National Archives since 1972 when this case was filed and prior thereto, plaintiffs have not made the required showing that the evidence could not have been discovered before now by the exercise of diligence.

"It is well settled that a motion for relief from judgment under our Rule 152(b)(2) is a motion which calls for ex-

traordinary relief and may be granted only where there is a showing of exceptional circumstances. *Valmont Industries, Inc.* v. *Enresco, Inc.*, 446 F. 2d 1193, 1195 (10th Cir. 1971); *Kaiser Aluminum & Chemical Corp.* v. *United States*, 187 Ct. Cl. 443, 451, 409 F. 2d 238, 243 (1969) (concurring opinion).

"Moreover, it is equally well established that the relief will not be granted on the plea of newly discovered evidence unless it clearly appears that such evidence could not have been discovered prior to trial through the exercise of reasonable diligence and that the evidence is such as would probably change the outcome of the case. *Giordano* v. *McCartney*, 385 F. 2d 154, 155 (3d Cir. 1967); *Posttape Associates* v. *Eastman Kodak Co.*, 68 F.R.D. 323 (E.D. Pa. 1975).

"After a careful review of plaintiffs' motion and the material submitted therewith, we have concluded that it fails to meet the requirements of our Rule 152(b) (2) as construed by this court and of comparable District Court Rule 60(b) as construed by the other courts.

"IT IS THEREFORE ORDERED that plaintiffs' motion be and the same is hereby denied."

No. 86–74. JUNE 27, 1975

Rex L. Applegate, et al.

Civilian pay; promotions; freeze on promotions.—The court, on June 27, 1975, issued the following order. (The order was incompletely reported in Volume 207 at pages 999–1000, and is being reported in toto herein.)

Before KASHIWA, *Judge*, Presiding, LARAMORE, *Senior Judge*, and BENNETT, *Judge*.

"This civilian pay case is before the court on cross-motions for summary judgment. Plaintiffs are employees of the United States Customs Service (formerly the Bureau of Customs, Department of the Treasury). Their employment at the Bureau of Customs began in the early Winter of 1971, when they were appointed as trainees at the GS–7 level. The Standard Form 50, 'Notification of Personnel

Action,' received by each plaintiff at the time of appointment, contains the following language:

> Trainee to journeyman promotion to GS–9 due [1 year from commencement of employment] providing all requirements are met.

Plaintiffs also received oral assurances of promotion similar to the above-written language.

"On December 11, 1972, the President of the United States ordered a freeze on, *inter alia*, virtually all promotions of Federal civilian employees. The freeze was lifted for Bureau of Customs employees on March 4, 1973, and plaintiffs were thereafter promoted to grade GS–9. The net result of the freeze was a delay of 2 to 3 months in the promotions anticipated for each plaintiff upon the completion of his first year of service. The relief sought is correction of records to show promotion to grade GS–9 at the end of 1 year of service and recovery of the difference in pay between the higher and lower grades during the period of delay.

"Plaintiffs first argue as a basis for recovery that the assurances of promotion they received were promises, the acceptance of which created contracts between plaintiffs and the Government. It is contended that the freeze on promotions was a breach of those contracts. We reject this contention and reaffirm that employment (and the perquisites thereof) by appointment with the Government does not create a contractual relationship. *Hopkins* v. *United States*, 206 Ct. Cl. 303, 513 F. 2d 1360 (1975), *Urbina* v. *United States*, 192 Ct. Cl. 875, 428 F. 2d 1280 (1970). Nor did plaintiffs otherwise have any 'legal entitlement' to promotion at the end of 1 year of employment. Appointment and promotion of employees are, of course, discretionary matters within the agency. *Hirsch* v. *United States*, 205 Ct. Cl. 256, 499 F. 2d 1248 (1974); *Tierney* v. *United States*, 168 Ct. Cl. 77 (1964); *Amundson* v. *United States*, 128 Ct. Cl. 80, 120 F. Supp. 201 (1954). There is no statute or regulation which mandates promotion of plaintiffs under these circumstances. Furthermore, the very assurances of promotion given to plaintiffs were conditioned on 'all requirements' being met. The availability of funds to pay the higher salaries of promoted employees is an assumed contingency to promotion and must

be considered as a 'requirement' within the meaning of the language of plaintiffs' Standard Form 50's. *See, e.g., Allison v. United States*, 196 Ct. Cl. 263, 269, 451 F. 2d 1035, 1038 (1971).

"Plaintiffs' second asserted basis for recovery is that the Office of Management and Budget's (OMB) refusal to exempt plaintiffs from the President's freeze order was arbitrary and capricious. Insofar as relevant here, the OMB had been empowered by the President to grant exceptions to the freeze 'where essential' 'to protect property' or 'to preserve the continuity of government.' Assuming, without deciding, that arbitrary and capricious action by the OMB would be the basis for an action in this court, we conclude that the OMB's action was neither arbitrary nor capricious. The OMB could reasonably conclude that plaintiffs' promotions were not essential to protect property or to preserve the continuity of government. In addition, the OMB's action was consistent with guidelines prepared by the Civil Service Commission, which guidelines did not recognize "career program, career ladder or similar promotion patterns" to constitute valid exceptions to the freeze.

"IT IS THEREFORE ORDERED, upon consideration of the arguments made by the parties both in briefs and orally, that plaintiffs' motion for summary judgment be and the same is hereby denied, and defendant's cross-motion for summary judgment is granted. Plaintiffs' petition is dismissed."

JUDGMENT ORDERS

WAGNER ELECTRIC CORPORATION V. THE UNITED STATES

No. 173–72

[208 Ct. Cl. 1024]

On August 6, 1976 the court ordered that judgment be entered for plaintiff in the sum $499,786.12, plus interest according to law.

GIMBEL BROTHERS, INC. V. THE UNITED STATES

No. 491–71

[210 Ct. Cl. 17, 535 F. 2d 14]

On August 13, 1976 the court ordered that judgment be entered for plaintiff in the sum of $1,506,174.34.

THEODORE E. CHARLEY V. THE UNITED STATES

No. 83–74

[208 Ct. Cl. 457]

On August 13, 1976 the court ordered that judgment be entered for plaintiff in the sum of $14,519.76, of which $1,016.33 should be credited to plaintiff's Civil Service Retirement Fund account, with the net balance, or $13,503.43 to be paid to plaintiff.

AGWAY, INC., SUCCESSOR TO COOPERATIVE GRANGE LEAGUE FEDERATION EXCHANGE, INC. V. THE UNITED STATES

No. 302-72

[207 Ct. Cl. 682, 524 F. 2d 1194]

On August 17, 1976 the court ordered that judgment be entered for plaintiff in the sum of $14,742.74, plus interest according to law.

PHILIP T. AND EDITH W. SHARPLES V. THE UNITED STATES

No. 63-73

[209 Ct. Cl. 509, 533 F. 2d 550]

On September 3, 1976 the court ordered that judgment be entered for plaintiffs in the sum of $94,569.39, plus statutory interest thereon from January 1, 1967.

TALLEY INDUSTRIES, INC. V. THE UNITED STATES

No. 326-72

Following the filing on February 20, 1976 of an opinion, findings of fact and recommended conclusion of law by Trial Judge White (reported in full text at 22 CCF ¶ 80,041), and pursuant to a stipulation between the parties, plaintiff agreed to accept $200,000 in full settlement of all claims set forth in the petition, and defendant consented to entry of judgment in that amount and dismissal with prejudice of its contingent counterclaim. On September 17, 1976 the court ordered that judgment be entered for plaintiff for $200,000 and that defendant's contingent counterclaim be dismissed with prejudice.

VALLEY VIEW SHOPPING CENTER, LTD. V. UNITED STATES

No. 96-75

[210 Ct. Cl. 89, 535 F. 2d 42]

On October 15, 1976 the court ordered that judgment be entered for plaintiff in the sum of $15,000.00.

REPORT OF DECISIONS
OF
THE SUPREME COURT
IN COURT OF CLAIMS CASES

Action was taken by the United States Supreme Court on the parties' petitions for writs of certiorari as follows:

Petitioners	Ct. Cl.	F. 2d	Supreme Court Denied
Northern Helex Co. No. 454–70	207:862	524:707	429 U.S. 866 Oct. 4, 1976
Leroy W. Abell and Jack R. Barger, et al. Nos. 261–72 & 371–73.	207:207	518:1369	429 U.S. 817 Oct. 4, 1976
Woodrow Yokum No. 2–75	208:972	----------	429 U.S. 820 Oct. 4, 1976
Samuel C. Wathen, Jr. No. 249–69	208:342 208:368	527:1191 527:1207	429 U.S. 821 Oct. 4, 1976
Union Pacific R.R. No. 310–62	208:1	524:1343	429 U.S. 827 Oct. 4, 1976
Antranik Malajalian No. 421–73	208:957	----------	429 U.S. 831 Oct. 4, 1976
Felix Pollutro No. 62–75	208:1018	----------	429 U.S. 831 Oct. 4, 1976
Boise Cascade Corp. Nos. 321–69 & 81–71	208:619	530:1367	429 U.S. 867 Oct. 4, 1976
General Foods Corp. No. 70–73	208:606	530:923	429 U.S. 867 Oct. 4, 1976
John Mackie No. 447–74	[1]	----------	429 U.S. 853 Oct. 4, 1976
Dante S. Reale No. 316–74	208:1010	----------	429 U.S. 854 Oct. 4, 1976
Fred E. Ringe, Jr. No. 203–74	209:782	----------	429 U.S. 860 Oct. 4, 1976
Charles H. Haight No. 50–74	209:698	----------	429 U.S. 841 Oct. 4, 1976

[1] Not reported.

Petitioners	Ct. Cl.	F. 2d	Supreme Court Denied
Ernie J. Johnson No. 88–74	208:409	527:1209	429 U.S. 889 Oct. 12, 1976
S. Sanford Levy, et al No. 172–75	210:97	535:47	429 U.S. 885 Oct. 12, 1976
Western Shoshone Legal Defense and Education Assoc., et al., App. No. 3–75.	209:43	531:495	429 U.S. 885 Oct. 12, 1976
Octa R. Whiteley No. 266–75	209:702	----------	429 U.S. 895 Oct. 18, 1976

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